

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION NO. 11-1086 (FLW)

MARNIE GLOVER, etc, et al.

Plaintiffs,

v.

FERRERO USA, INC.,

Defendant.

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: TRANSCRIPT OF  
: PROCEEDINGS  
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: JULY 9, 2012  
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CLARKSON S. FISHER UNITED STATES COURTHOUSE  
402 EAST STATE STREET, TRENTON, NJ 08608

B E F O R E : THE HONORABLE FRED A. L. WOLFSON, USDJ

A P P E A R A N C E S :

CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C.  
BY: JAMES E. CECCHI, ESQUIRE

-and-

SCOTT & SCOTT, LLP (NEW YORK)  
BY: JOSEPH P. GUGLIELMO, ESQUIRE  
ERIN GREEN COMITE, ESQUIRE

-and-

SEEGER WEISS, LLP (NEW YORK)  
BY: STEPHEN A. WEISS, ESQUIRE

-and-

DAVIS & TALIAFERRO, LLC (ALABAMA)  
BY: GREG L. DAVIS, ESQUIRE  
On behalf of the Plaintiffs

WILSON SONSINI GOODRICH & ROSATI, ESQUIRES (CAL.)  
BY: KEITH E. EGGLETON, ESQUIRE  
On behalf of the Defendant

(Continued.)

\* \* \* \* \*

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C E R T I F I C A T I O N

PURSUANT TO SECTION 753, TITLE 28, USC, THE  
FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE  
TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE  
ABOVE-ENTITLED MATTER.

S/Vincent Russoniello  
VINCENT RUSSONIELLO, CCR  
OFFICIAL U.S. COURT REPORTER

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1 (In open court.)

2 THE CLERK: All rise.

3 THE COURT: Good morning.

4 I'll have the appearances. Everyone else may  
5 be seated.

6 MR. CECCHI: Good morning, your Honor.

7 James Cecchi, Carella Byrne, on behalf of the  
8 Class.

9 With me this morning is my co-counsel, Joseph  
10 Guglielmo, from Scott & Scott.

11 MR. GUGLIELMO: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. CECCHI: Also, plaintiffs' counsel is  
14 Stephen Weiss from Seeger Weiss.

15 MR. WEISS: Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. CECCHI: Greg Davis and Erin Comite, also  
18 from Scott & Scott.

19 MR. DAVIS: Good morning, your Honor.

20 MS. COMITE: Good morning, your Honor.

21 THE COURT: Thank you.

22 MR. EGGLETON: Good morning, your Honor.  
23 Keith Eggleton for Ferrero U.S.A.

24 Along with me is my client's general counsel,  
25 Beth Kotran.

1 MS. KOTRAN: Good morning.

2 THE COURT: Thank you.

3 MR. LEVY: Good morning, your Honor.

4 | Lester Levy for objector Any Ades.

5 MR. GREENBERG: Good morning, your Honor.

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6         My name is Dan Greenberg.  I'm representing
7  myself.
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8 MR. LANGONE: Good morning, your Honor.

9 Chris Langone on behalf of objectors Agatha  
10 Bochenek, Brandon Goodman, and Edward Hagele.

11 THE COURT: Thank you. You may have a seat.

12               We are here today, obviously, for the request  
13   to approve the class action settlement and fees in  
14   this case, to certify the class, and grant final  
15   approval.

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16         The first thing, however, that I would like to
17 do is:
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18                   One, I'll note that I received many  
19       submissions in this case: I've received the briefing  
20       from class counsel, and then I received objector  
21       briefing, letters as well, and then I received the  
22       responsive papers last Monday from class counsel; and  
23       then Ferrero as well filed papers at that point; and  
24       then there were some additional papers filed at the  
25       end of the week by Mr. Greenberg with regard to the

1 declaration of Larry Johnson. And I did convene a  
2 conference call on Friday, which was not on the  
3 record, but counsel participated, class counsel, as  
4 well as Ferrero, and as well as Mr. Greenberg on that  
5 conference call. It was not, as I said, on the  
6 record. I indicated that I would address it formally  
7 this morning, though I gave my ruling at that time.

8 Let me just, at this time, make clear what  
9 that ruling was. That was last Friday, July 6th, that  
10 I indicated that I would be striking the report of  
11 R. Larry Johnson who was valuing the injunctive  
12 relief.

13 Mr. Greenberg had made a motion -- had made  
14 several motions, actually. One was to unseal the  
15 redacted report of Mr. Johnson. The redactions were  
16 reflecting sales figures that have been produced by  
17 Ferrero pursuant to a confidentiality order and an  
18 order had been entered by Judge Arpert agreeing to the  
19 filing of the redacted report to protect what had been  
20 designated as confidential information.

21 I will note that on the conference call  
22 Mr. Eggleton indicated that he would be willing --  
23 because, also, Mr. Greenberg is an attorney at law --  
24 that he would be willing to unseal the report to him  
25 if Mr. Greenberg were willing to abide by the



1 confidentiality order in other respects. However,  
2 because I had already determined that the Johnson  
3 report would not be used, that essentially mooted the  
4 motion for sealing, and thus that was denied.

5 Let me indicate my rulings with regard to the  
6 Johnson report.

7 The Johnson report values the injunctive  
8 relief that was achieved in this case based on the  
9 increased sales of Nutella after defendant began its  
10 advertising campaign in 2008. Based on quarterly  
11 sales figures, Mr. Johnson found that there was a  
12 higher average annual increase in sales now as opposed  
13 to before the campaign. He assumed some amount of  
14 that increase was attributable to the allegedly  
15 deceptive statements or advertising messages. Because  
16 defendant will now be prohibited from using the same  
17 statements, allegedly deceptive statements, Johnson  
18 argued defendant would suffer a loss.

19 He then goes on to opine that if this is only  
20 even a 1 percent loss, calculated over the next three  
21 years it would yield a loss of \$9 million and could  
22 conceivably be a loss of up to approximately  
23 \$41 million, depending on the figures.

24 Based on this, class counsel valued the  
25 injunctive value at a significant amount and argued

1 with regard to a fee award of \$3 million being  
2 appropriate.

3 I note that Mr. Johnson submitted his report  
4 well after the parties had agreed to the fee being  
5 requested for the injunctive relief. My concern with  
6 Mr. Johnson's report was not the timeliness of the  
7 report so much as perhaps the fortuitousness of his  
8 after-the-fact findings. What he did not address in  
9 his report and what I found was fatal to his findings  
10 is whether any of the increased sales of Nutella were  
11 truly caused by what plaintiffs claim to be the  
12 allegedly deceptive advertising or marketing.

13 I found and I do find that the report is  
14 speculative and based on conjecture because  
15 Mr. Johnson cannot attribute with any certainty an  
16 increase in sales to the allegedly deceptive  
17 statements only.

18 A critical fact and what Mr. Johnson  
19 apparently chose to completely ignore was that this  
20 was the first major Nutella ad campaign in the United  
21 States by defendant. I note that that appears in the  
22 brief that was filed by Ferrero at page 11, note 2;  
23 and they say:

24 "The challenged advertising campaign was the  
25 first time that Nutella had ever been advertised in

1 the United States in any meaningful away."

2           Indeed, when I questioned counsel on the  
3 phone, class counsel admitted on the conference call  
4 that they, as well as Mr. Johnson, were aware of this  
5 fact prior to Mr. Johnson's report and while counsel  
6 revealed that they had informed Mr. Johnson of this  
7 fact. It stands to reason that the advertising, even  
8 without the allegedly deceptive nutritional  
9 information, would cause an increase in sales since  
10 the product was being exposed for the first time to a  
11 wide United States market.

12           Nonetheless, Mr. Johnson failed to even note  
13 this fact and, instead, provided no analysis to  
14 suggest what effects an advertising campaign, without  
15 the allegedly deceptive statements, -- presumably the  
16 ad campaign that the defendant has now agreed to  
17 undertake -- would have on the sales of Nutella.

18           Class counsel conducted no surveys and  
19 provides no evidence in the record to show that  
20 increased sales occurred specifically because of the  
21 deceptive statements or labeling or because of an  
22 advertising campaign generally. Even if the sales  
23 were increased because of the alleged deceptions,  
24 there is no evidence in the record to suggest that the  
25 sales will now decrease.

1 Ferrero argues it has a very loyal fan base  
2 and its sales have increased despite the negative  
3 publicity flowing from the consumer fraud lawsuits.

4 Because of these reasons, I am striking the  
5 report.

6 Let me note in the briefing submitted by  
7 plaintiffs' counsel they argued that the Court should  
8 not undertake a Daubert analysis, and that Daubert  
9 does not apply in a fairness hearing context, largely  
10 relying on case law from the Sixth Circuit and other  
11 jurisdictions. The Third Circuit case cited by the  
12 plaintiffs, which was the Warfarin case, doesn't  
13 exactly say what is suggested. Indeed, the Court in  
14 Warfarin doesn't refer to Daubert. It simply says  
15 that the District Court reviewing the expert report  
16 and some of the supporting materials concluded that  
17 Dr. French's estimate of the range of possible damages  
18 was reasonable if the case were to go to trial.

19 Yes, so what it notes is, it doesn't  
20 specifically or expressly state how or if Daubert  
21 could be used but implicitly indicates you do not need  
22 a rigorous Daubert analysis.

23 I note that more recently the Third Circuit in  
24 the Dewey case, -- and that was Dewey v. Volkswagen at  
25 681 F.3d 170 -- decided May 31, 2012 -- the Third

1 Circuit in reviewing the hearing conducted by Judge  
2 Schwartz noted that Judge Schwartz had done a Daubert  
3 analysis in the fairness hearing, the settlement  
4 fairness hearing, with regard to an expert's testimony  
5 and found that she had undertaken, indeed, a  
6 painstaking analysis, and they found that the Court  
7 did not abuse its discretion in declining to exclude  
8 testimony in its entirety. She excluded certain  
9 testimony based on her Daubert analysis.

10 Clearly, the Third Circuit did not opine its  
11 opinion that engaging in a Daubert analysis was not  
12 appropriate. And while I note here that I have not  
13 engaged in a painstaking Daubert analysis, I do not  
14 find it would be necessary here because I find that  
15 the opinion of Johnson has no core foundation to  
16 support it. His reliance on conclusions without  
17 analyzing the critical fact that there had been no  
18 advertising before gives his opinion no legs to stand  
19 on, and it would be ill-advised by this Court,  
20 therefore, to consider his opinion in any fashion.

21 So I have struck that report. That's how we  
22 begin.

23 Now, I have a couple of questions before  
24 anyone wants to do presentations or present argument.

25 One is that there seems to be an error in the

1 most recent declaration of Charlene Young from Rust,  
2 and that is the following:

3 Ms. Young notes that as of May 23rd, Rust had  
4 received 253,413 claims. Then she notes the  
5 additional claims that were received between that date  
6 and June 29th, when the final declaration was to be  
7 filed, and said there were an additional 13,629 claims  
8 filed, and then she says Rust received, therefore, a  
9 total of 208,248 claims. Clearly wrong. Less than  
10 the number she had the first time.

11 MR. GUGLIELMO: I can clarify, your Honor.

12 This is Joseph Guglielmo on behalf of  
13 plaintiffs.

14 The declaration of Ms. Young is attempting to  
15 describe to you the amount of claims -- both in the  
16 California, which is a separate class, and the  
17 nationwide class. And I will admit it wasn't  
18 articulate in that there are 208,000 nationwide claims  
19 that were filed in this action and then there were the  
20 additional claims the 74,000 claims that were filed in  
21 the California action. She's combining it because  
22 this is a joint notice program that we enacted with  
23 the attorneys in California to effectuate the  
24 settlements both here and in California.

25 THE COURT: Certainly not clear from what she

1 wrote because, in fact, in her first certification in  
2 paragraph 10, she's talking about our class action  
3 settlement agreement, and she talked about potential  
4 settlement class members. So it's not what I got from  
5 it.

6 MR. GUGLIELMO: Your Honor, we are more than  
7 happy to have Ms. Young submit a revised declaration  
8 that clarifies these numbers for you and for the  
9 Court.

10 THE COURT: I see in paragraph 10 where she's  
11 trying to explain it, but it is not crystal clear, her  
12 supplemental certification. But, all right. It  
13 wasn't clear to me.

14 Let me also, just at the outset I would like  
15 to discuss with counsel the manner in which your  
16 rates, hourly rates, were submitted for the work done,  
17 which was done only for purposes of the lodestar  
18 check, because you are not actually looking for a  
19 lodestar recovery but a percentage of the common fund.  
20 But I have a problem.

21 I appreciate that you need not give me chapter  
22 and verse of what your fees are. But I must point out  
23 that at least with the Carella firm I had codes that  
24 indicated what kind of work was being done by which  
25 attorneys. I had nothing from the other attorneys as

1 to how many hours were spent on what tasks; and it,  
2 one, creates grave concerns for this Court in  
3 determining whether you have provided me an adequate  
4 basis for determining what your real fees were for the  
5 lodestar check because everyone gives the same general  
6 descriptions: You worked on motions. You worked on  
7 discovery. You worked on the settlement. And I've  
8 got five law firms all telling me the same thing which  
9 leads me to believe duplication of effort, and no one  
10 has broken this down -- and also such substantial  
11 number of hours that were spent where the Court can't  
12 even assess in the broadest fashion whether it was  
13 reasonable amounts of time being spent.

14 I start with that. No breakdown at all even  
15 in a summary fashion.

16 I also want to question each of plaintiffs'  
17 counsel that has submitted a declaration with regard  
18 to the hourly rates being provided to me. I want to  
19 know if what you are representing to me is that the  
20 hourly rates that you have listed are the hourly rates  
21 that your firm, that these lawyers in your firms --  
22 whether these are the hourly rates that these  
23 attorneys charge your clients generally, those who  
24 actually pay hourly fees, and that is what you  
25 receive, as opposed to whether these are rates that



1     you claim to use in class actions for which no one is  
2     ever paying an hourly rate because they are taken on  
3     contingent fees.

4                   So I'll start with you, Mr. Cecchi.

5 Are the rates that you have listed for you  
6 your partners and your associates the rates that are  
7 generally charged by your firm by these lawyers for  
8 work that is done by your firm?

9 MR. CECCHI: Judge, these are the rates and  
10 forms that we utilize in every contingent case that I  
11 have been involved in, and my hourly practice. And I  
12 do a huge amount of hourly work. The rates vary,  
13 depending upon a particular retainer, all the way from  
14 almost \$500 to \$650. But the rates that are reflected  
15 in my affidavit and breakdown, I've been using these  
16 rates in every contingent, including private  
17 contingent cases since 2007.

18 THE COURT: That wasn't my question. And I  
19 understand, and everyone knows where I'm coming from  
20 in asking these questions.

21           You can set the moon for your contingent fee  
22   hourly rate, because you're never collecting an hourly  
23   rate. So I need to know when I'm doing a reasonable  
24   lodestar crosscheck what is the customary hourly rate.

25 And I say this particularly, because putting

1     aside, Mr. Cecchi, you may be a very able and  
2     experienced attorney, and you may actually charge \$750  
3     for your work, I don't believe your associates -- that  
4     any client you got is paying \$550 for your associates  
5     for hourly work in a New Jersey firm, not that I know  
6     of.

7             MR. CECCHI:   Maybe not some of them, but some  
8     of my junior partners.

9             THE COURT:   I didn't say "partners."   I said  
10    "associates."

11            MR. CECCHI:   You are right.   And I think I  
12    stand in a somewhat unique position because we do have  
13    a blended practice where we do a lot of litigation,  
14    retained complex commercial, and so on.

15            But I have your Honor's point, and I think  
16    that I can address it because I was going to make the  
17    remarks about the fee in any event.   I think I can  
18    address it at that time.

19            THE COURT:   That's fine.

20            Similarly, I've got from the attorney -- I  
21    guess it's Mr. Davis from Mobile, Alabama.

22            MR. DAVIS:   Montgomery, Alabama.

23            THE COURT:   Montgomery.   I'm sorry.

24            (Continuing) -- and you tell me \$700 is the  
25    normal fee in Mobile.   Boy, the New Jersey lawyers are

1 going down there!

2 MR. DAVIS: That's the fee I charge in all my  
3 contingent cases.

4 THE COURT: Contingent, again.

5 What's the normal hourly rate in Montgomery  
6 for work done, legal work?

7 MR. DAVIS: It depends on the case, your  
8 Honor. I charge \$500 an hour for some cases. I  
9 charge more than that for others. But, typically,  
10 around \$500 an hour.

11 THE COURT: Who else have I got?

12 You are Mr. Guglielmo. Right?

13 MR. GUGLIELMO: Yes, your Honor. And these  
14 are the rates that Scott & Scott charges. We do  
15 almost exclusively contingent fee work. We have some  
16 hourly rate cases, and it's my understanding that  
17 these are the same rates that we use for those very,  
18 very small hourly rate cases that we have, but we  
19 almost have almost none.

20 THE COURT: Okay.

21 Who else do I have that's made a fee  
22 application?

23 MR. WEISS: Your Honor, Stephen Weiss from  
24 Seeger Weiss in New York City.

25 The rates that I attested to are in fact

1 Seeger Weiss' hourly rates. We have a number of  
2 hourly clients. Those hourly clients pay those rates.  
3 I can attest to that as well. So I think across the  
4 board, from partner to associate to paralegals, all of  
5 the rates so stated in the declaration are our actual  
6 hourly rates.

7 THE COURT: Okay.

8 Now, who is that? Scott & Scott, \$635 an hour  
9 for associates?

10 MR. GUGLIELMO: Yes, your Honor. Certain  
11 associates are actually very senior in age.

12 THE COURT: People that you don't make  
13 partners, they are called "associates." I see.  
14 That's fine.

15 All right. I think counsel appreciates what  
16 I'm saying with regard to when I apply the lodestar  
17 check, how I will be looking at it, because, as I  
18 said, it's really not fair, I believe, that in these  
19 contingent fee cases to essentially come up with a  
20 number that's not your real hourly billing rate number  
21 for purposes of the cross-check, and that's my view  
22 because, as I said, in a contingent fee case where you  
23 never intend to collect against the client or charge  
24 him for that hourly rate, you can charge him \$10,000  
25 an hour and it would make no difference, and it's not

1 appropriate for the Court to consider that rate if  
2 it's not the real rate.

3 So I'll put that aside.

4 I still have -- and we'll address this when we  
5 get to the fees as well, though, and I really was left  
6 at a loss by all of you submitting these kinds of, in  
7 the most general fashion, other than Mr. Cecchi's  
8 firm, any breakdown of how many hours you spent on a  
9 task. There wasn't that much that happened in this  
10 case. How could it be? Hundreds upon hundreds of  
11 hours each of you are spending doing the same thing?  
12 I've got a problem with it. We'll talk about it  
13 later.

14 Let's at this time address the settlement.

15 What I want to address -- and I'm going to  
16 consider the arguments separately, obviously -- the  
17 fees from the overall monetary settlement that was  
18 being achieved for the class, and it's appropriate to  
19 consider whether that meets all the criteria on the  
20 monetary settlement, and then consider what fees would  
21 be appropriate assuming that is approved, and then  
22 separately consider the injunctive relief portion and  
23 the fees in that regard.

24 Now, I certainly have received substantial  
25 briefing from everyone. I have several objectors here

1 -- and, frankly, most of the objections really are  
2 dealing with the fee as opposed to, I think, the  
3 fairness or reasonableness of the monetary settlement.  
4 And others, of course, take great issue with the  
5 injunctive relief. That's another subject.

6 I want to first deal with the monetary  
7 settlement here. There really has not been, I think,  
8 any material or substantial objection to the monetary  
9 settlement.

10 Yes.

11 MR. LEVY: Your Honor, --

12 THE COURT: Come forward.

13 You have the Bochenek objectors?

14 MR. LEVY: No. Amy Ades, your Honor.

15 THE COURT: Well, that's because for Ms. Ades  
16 you filed a complaint for her in New York and you want  
17 to carve her out of this because you want your own  
18 piece of the pie.

19 MR. LEVY: I want my own class to prosecute,  
20 your Honor, yes.

21 THE COURT: Tell me why this isn't fair. I  
22 understand you do.

23 MR. LEVY: I'll tell you.

24 THE COURT: I haven't seen it in your papers.

25 MR. LEVY: All right.

1           Less than two weeks ago, after my papers came  
2     in, the Third Circuit reversed District Court's  
3     approval of the consumer class action. It was  
4     actually Mr. Cecchi's class action. It was in the  
5     AT&T Mobility case.

6           THE COURT: I'm familiar with that.

7           MR. LEVY: And the Court said that the  
8     District Court did not adequately supervise the  
9     approval of that, and breached the discretion of the  
10    Court in approving the settlement.

11          One of the things I think the Court should do  
12    in looking at the cash component of this settlement is  
13    see if the fee of the 2.5 million -- what is that  
14    worth? What percentage of damages?

15          I know in a securities class action the notice  
16    has to say --

17          THE COURT: Put aside securities class  
18    actions. That's not what this is.

19          MR. LEVY: But the plaintiff has the burden of  
20    showing the the 2.5 million, which nets to about 1.3  
21    million to the class, is the appropriate amount.

22          THE COURT: I haven't ruled on the fees yet.

23          MR. LEVY: I'm talking about the 2.5, just  
24    starting with the 2.5.

25          THE COURT: I know. But you said it yields

1 1.3 for them. We're not there yet as to what it  
2 yields.

3 MR. LEVY: If 2.5 is 10 percent of the  
4 potential damages, 5 percent of the potential damages,  
5 one-eighth of 1 percent, we should know that. The  
6 Court should know that. The class should know that.  
7 If it's such a tiny portion of the potential damages,  
8 it's because the case is so bad that they have to  
9 settle for that, and they haven't said that. But they  
10 also haven't said what percentage of damages it is. I  
11 think the Court cannot approve a 2.5 million without  
12 knowing how good the case is compared to what the  
13 potential damages are.

14 THE COURT: Well, I'll let plaintiff respond  
15 first, but I have several responses to you. But I'll  
16 let them, if they would like to, argue first.

17 Who is going to be arguing that?

18 MR. CECCHI: Judge, with the Court's  
19 permission, Mr. Guglielmo and I have divided it. He  
20 has the bulk of the objections. But since Mr. Levy  
21 felt it appropriate to touch upon where I consider to  
22 be somewhat of a sore subject, the Sprint Larsen  
23 settlement, I just wanted to briefly address that.

24 The Sprint Larsen case was a unique case.  
25 Judge Linares conducted a four- or five-day



1 preliminary approval hearing where we had witnesses on  
2 the stand. It was a conflagration of sorts. He wrote  
3 over 200 pages of opinions. I don't want the record  
4 to reflect that Court of Appeals said Judge Linares  
5 did not go to great lengths to discharge his Rule 23  
6 duties. He indeed did. It's a discrete issue  
7 involving whether Sprint had to do a costly expensive  
8 data dump of its data bases and what it would yield in  
9 terms of notice. It was reversed and remanded for  
10 Judge Linares to do further findings. They did  
11 nothing about the fairness.

12 The fee was affirmed, your Honor, in the  
13 companion case against T-Mobile, and the fee was  
14 affirmed in the companion case against ATT. Both of  
15 those cases were affirmed. So the discrete issue has  
16 nothing to do with here.

17 In terms of Mr. Levy, I think your Honor's  
18 initial observation is the correct one. His case was  
19 filed after we had already mediated with Judge Politan  
20 and reached an agreement in principle. We advised  
21 Mr. Levy of that fact, that we had already settled in  
22 principle, and we were in the process of documenting  
23 the settlement when he filed his case.

24 So we think this is nothing more than someone  
25 coming forward seeking something they are not entitled

1 to here. It has nothing to do with the fairness of  
2 the settlement.

3 Thank you, your Honor.

4 (Pause.)

5 MR. CECCHI: Can I make one very just  
6 introductory comment, Judge?

7 THE COURT: Yes.

8 MR. CECCHI: I know there are a lot of  
9 objectors here, and there has been a lot of press, and  
10 it's my practice and I think the practice of all the  
11 lawyers who've represented the plaintiffs in this case  
12 to comment in court, to comment to your Honor, and to  
13 comment in our papers. We have not had an opportunity  
14 to say to these objectors and to say to the press the  
15 background of this case.

16 First of all, I want the Court to know we are  
17 proud of what we achieved in this case, we stand  
18 behind what we achieved in this case, and it's a  
19 particularly bittersweet sort of situation that I find  
20 myself in and these other lawyers, and I know Keith  
21 feels the same way. This is the last case any of us  
22 ever did with Judge Politan. He worked very hard on  
23 this case as we all did. This was a difficult case  
24 for the plaintiffs. It was a difficult case from the  
25 perspective of damages. All consumer cases are. This

1 case perhaps more so.

2           Ascertainable loss was an issue where we felt  
3 we had arguments, good faith arguments, but issues  
4 that would have been had they gone the other way would  
5 have been fatal to a damage claim in this case, and  
6 that was an issue that was explored in detail in  
7 mediation with Judge Politan.

8           So we are glad we are here today. We look  
9 forward to talking about all the alleged deficiencies  
10 in the settlement, which we don't think there are any,  
11 but I do want to say that background is important.  
12 This was supervised by the nation's leading mediator;  
13 and one of the objectors, and it's really amazing,  
14 said they didn't even bother having an affidavit from  
15 Judge Politan about what happened. We would have  
16 liked to have had that affidavit, Judge, and I think  
17 Judge Politan would have agreed with me that this was  
18 a hard fought mediation, this was a difficult case for  
19 us, and we reached a good deal for this class, and, as  
20 I said, we do stand behind it and look forward to  
21 talking about it today.

22           Thank you, Judge.

23           MR. GUGLIELMO: Good morning, your Honor.  
24 Joseph Guglielmo with Scott & Scott.

25           My question is: Do you want me to respond to

1 Mr. Levy's comments or do you want me to go forward  
2 with presenting argument to the Court of the final  
3 approval?

4 THE COURT: Well, is Mr. Levy the only one  
5 that's going to be addressing the fairness of the  
6 monetary settlement?

7 Mr. Greenberg, you are going to be as well?

8 MR. GREENBERG: Yes, at some point briefly.

9 THE COURT: Why don't you hear the objections,  
10 then, before you address them.

11 Why don't I hear from you now. This is not on  
12 the fees portion; only the overall 2.5-million-dollar  
13 monetary settlement.

14 Is that what you are going to address?

15 MR. GREENBERG: Yes, your Honor.

16 THE COURT: Come forward, Mr. Greenberg.

17 MR. GREENBERG: Very briefly, your Honor.

18 I just would like to make one point about the  
19 structure of the settlement which I think is related  
20 to what you are talking about, and that's the concern  
21 about reversion of the fee to defendant.

22 Our concern here is that --

23 THE COURT: I'm talking about the monetary  
24 settlement, and there is no reversion of a fee to  
25 defendant. What you are talking about is on the

1 injunctive relief portion. I'm dealing with that  
2 separately. I'm talking about the monetary  
3 settlement.

4 MR. GREENBERG: I apologize, your Honor.

5 THE COURT: Thank you.

6 I didn't think there was any other objection  
7 to addressing the fairness of the monetary settlement.  
8 Because, as I also understand, as some of the  
9 objectors have even put into their papers, they are  
10 not even sure who wouldn't understand that this was a  
11 hazelnut chocolate spread.

12 Go ahead.

13 MR. GUGLIELMO: Joseph Guglielmo, again, on  
14 behalf of the plaintiffs.

15 Your Honor, the issue with respect to what  
16 Mr. Levy raises as to the fairness of the settlement,  
17 it simply goes to one of the sort of overall  
18 objections that he thinks it's not enough. And there  
19 are numerous cases we cited in our brief, including  
20 Hall v. AT&T, which says it is not a valid objection  
21 to the settlement to say: Well, you could have gotten  
22 more. You need to look at the circumstances of the  
23 case and where we were in the case.

24 We had pending motions to dismiss that would  
25 be filed. We had class certification --

1           THE COURT: Actually, had been filed and then  
2           were terminated. The actions were consolidated. In  
3           fact, I never got a consolidated amended complaint in  
4           this matter.

5           MR. GUGLIELMO: We had drafted one, your  
6           Honor, and we reached a settlement. So at that point  
7           it was essentially moot.

8           With respect to his specific argument, your  
9           Honor, we made available to class members a fund that  
10          would compensate them for over a hundred percent of  
11          the purchase price for Nutella based on the claim rate  
12          which has been very high. I think that goes to show  
13          you folks are very happy with the settlement. We have  
14          over 208,000 claims in the nationwide settlement.  
15          Class members will receive anywhere from 37 percent of  
16          the purchase price of the smaller jar and 20 percent  
17          of the purchase price of the larger jar. There are  
18          two essential jars that are sold to class members  
19          during the period.

20          A number of the objectors are saying: Well,  
21          you should have gotten 100 percent. Well, the problem  
22          with that is that we recognized, and as the Court  
23          recognized, when you receive something in exchange for  
24          what you pay for, it's very difficult to say that you  
25          are entitled to the purchase price.

1           THE COURT: You would not have been entitled  
2 to the purchase price. Let's put an end to that  
3 argument.

4           MR. GUGLIELMO: Your Honor, and we put that  
5 forth in our papers.

6           So the question is what percentage of the  
7 purchase price we could be required or we could obtain  
8 if we were successful.

9           Your Honor, you could find as a matter of --  
10 either at summary judgment or class certification --  
11 that we were entitled to nothing, because Ferrero  
12 would have argued that no class member was deceived.  
13 They did get what they bargained for, which was a  
14 tasty nut spread that kids love. And the issue there  
15 was: Well, what percentage of damages is reasonable?

16           The percentage recovery that we were able to  
17 obtain is well within this Circuit's and this  
18 District's standards for appropriate recoveries. You  
19 have class settlements where folks get 5 percent, 10  
20 percent of the dollar damage. Here they are getting  
21 20 to 37 percent of the purchase price, which could be  
22 over 100 percent of damages, your Honor, depending on  
23 how it's calculated.

24           THE COURT: By the way, let me just put this  
25 question. I don't want to belabor this. We have so

1 much briefing on these issues. But one of the things  
2 -- and I'll address this in the opinion that I will  
3 read into the record in a bit, but we obviously  
4 recognize that there were issues of one surviving  
5 motion practice as to whether, indeed, first, there  
6 was unlawful conduct; second, as to whether there was  
7 an ascertainable loss and causation between the  
8 three -- all of which must be proven in a New Jersey  
9 Consumer Fraud Act case.

10 With regard to ascertainable loss, another  
11 item would have been when you talk about what did the  
12 consumer get and what might they have expected to get,  
13 and if you compare this to what is another hazelnut  
14 chocolate spread, there is no indication that, one,  
15 there were such comparable products on the market at  
16 this time, though I understand there are ones entering  
17 the market now, and what the pricing would have been,  
18 and whether the pricing of Nutella was different or  
19 not than what would have been advertised as just a  
20 tasty spread.

21 I do not think that, Mr. Levy, you have a  
22 basis to really dispute that ascertainable loss here  
23 was going to be a major, major roadblock. I will make  
24 specific findings about that in a bit, but I do not  
25 need to belabor that.



1 I should state on the record, because  
2 Mr. Cecchi got up to make the comment, some of the  
3 objectors referred to whether there was some sort of  
4 collusion here between either the defendant and  
5 plaintiffs' counsel and/or the mediator. Wrong.  
6 There is no evidence of that.

7 Judge Politan was a colleague of mine. I'm  
8 familiar with him and his stature, the late Judge  
9 Politan -- by the way, he was not chief judge. I  
10 think you referred to him as that in your papers.

11 MR. EGGLETON: He always felt that way to me,  
12 your Honor.

13 THE COURT: Okay. The person who was the  
14 chief probably wouldn't have been happy to have you  
15 refer to him that way.

16 MR. EGGLETON: I apologize for that.

17 THE COURT: But he has been used as a national  
18 mediator. His credentials were impeccable.

19 And I understand what this case was about, and  
20 I do not find that there was anything that was  
21 produced here that would indicate collusion. So I'm  
22 putting that to rest. I don't want to hear any  
23 arguments about it.

24 MR. GUGLIELMO: Thank you, your Honor.

25 THE COURT: Do you want to make any comments

1 besides the pages of briefing I have as to the  
2 fairness of the monetary settlement?

3 MR. GUGLIELMO: No, I think that's succinctly  
4 set forth.

5 THE COURT: I was dividing these issues up  
6 because I have objectors on different issues as well.

7 All right. Let me hear from -- I think it's  
8 you, Mr. Greenberg, who wanted to address the  
9 injunctive relief aspect.

10 MR. GREENBERG: Well, on the fact of  
11 injunctive relief and the concerns about the value of  
12 injunctive relief, I don't know that I have too much  
13 to add to the briefing.

14 I simply want to make the point that,  
15 obviously, it's not my role as an objector to bear the  
16 burden of demonstrating the settlement has no value.  
17 Class counsel suggests that we have some sort of  
18 burden in their papers to demonstrate the settlement  
19 has no value. Obviously, they have the burden to  
20 demonstrate that it has value.

21 Obviously, the first expert report avoids the  
22 question of the monetary value of the injunctive  
23 relief, and, obviously, the second report doesn't have  
24 the standing because of your ruling last week.

25 There are some cases that they cite in their

1 response that injunctive relief has value that I  
2 believe are quite inapposite. Two of those are  
3 shareholder cases and the third is a pension  
4 retirement case. In those cases there is a stronger  
5 argument to the value of injunctive relief because the  
6 corporation is going to be stuck with its future self  
7 and the pensioners are always going to be stuck with a  
8 pension. This is different. Even in that context,  
9 the law in the Third Circuit says there are grounds  
10 for skepticism about the value of the injunctive  
11 relief in those cases.

12 And if you'll forgive me, I'm going to read  
13 you two sentences from Bell v. Bolger, from the cases  
14 they cite, and that's 2 F.3d 1304; and those sentences  
15 are:

16 "The difficulty in valuing therapeutic relief  
17 poses significant risks. Parties may capitalize on  
18 the valuation problem and exchange cosmetic reforms  
19 for plaintiff fees."

20 Those quotes are in the opinion.

21 So it's my view that the injunctive relief is  
22 essentially valueless. I was surprised, of course, to  
23 see the response from class counsel which says that  
24 all I provided for my view that survey evidence is  
25 necessary to demonstrate the value of injunctive

1 relief -- they say all I provided was naked  
2 assertions. In fact, I provided appellate case  
3 citations for my view that some sort of survey  
4 evidence is necessary to demonstrate the value of  
5 injunctive relief. They respond by saying survey  
6 evidence is not needed. They cite nothing for that,  
7 and I would call that a naked assertion.

8 THE COURT: Certainly, I will tell you, as I  
9 made my ruling with regard to the Johnson report, if  
10 they wanted to rely on specific numbers, as the  
11 Johnson report did, a survey would have been  
12 appropriate, but, ultimately, that's not what we are  
13 doing. Now it's more in the nature of: Can you  
14 discern some benefit from these changes in advertising  
15 so that the injunctive relief has some benefit? The  
16 question of how to value, that is a very different  
17 matter.

18 I have to say, Mr. Greenberg, I think you may  
19 be hard-pressed to say it has no value.

20 MR. GREENBERG: I think it's probably fair to  
21 say it has very little, or I think, perhaps, an  
22 appropriate phrase might be, essentially none. I  
23 think there is some question as to the value of a  
24 reform that puts nutritional information on the front  
25 of a package as opposed to the back of a package. I

1 have a general view, I suppose, about how often people  
2 look at this nutritional information. Some people do  
3 and some people don't, obviously.

4 THE COURT: Those to whom it matters.

5 MR. GREENBERG: Right. It seems like the  
6 number of people who are looking for nutritional  
7 information -- and who will not look at the back, but,  
8 instead, will look at the front -- would have to be  
9 awfully small. So I would say there is a pretty  
10 strong argument the value is essentially nil from any  
11 of these things.

12 THE COURT: That's one of the items which is  
13 putting the information on the front in addition to  
14 the back. The other is changing the message, the  
15 wording of the message, and the way the TV commercials  
16 will run, and things of that nature, which changes the  
17 wording a bit.

18 MR. GREENBERG: Yes. And there is certainly  
19 an argument that the new slogan, instead of making  
20 things better, arguably makes things worse because it  
21 seems to suggest a nutritious breakfast and a healthy  
22 breakfast is not generally a taste breakfast. As a  
23 parent, I suppose I have a concern about that sort of  
24 message being sent out to my children.

25 So I think there are fairly strong arguments,

1 actually. I'll be happy to go through them one by one  
2 if you would like, your Honor, but it's in the  
3 briefing.

4 THE COURT: I have your papers.

5 MR. GREENBERG: Thank you, your Honor.

6 THE COURT: Yes? Another objector wishes to  
7 be heard?

8 MR. LANGONE: Yes, your Honor.

9 THE COURT: Please state your name for the  
10 record.

11 MR. LANGONE: Chris Langone of the Bochenek  
12 objectors.

13 On the value of the injunctive relief, I would  
14 just like to make two brief points.

15 MR. CECCHI: Judge, I don't want to interrupt  
16 Mr. Langone, but we have a threshold issue about  
17 Mr. Langone's standing.

18 THE COURT: Yes. I have that question,  
19 actually, because there is nothing that indicates that  
20 those who you represent are part of the class. They  
21 have not indicated that they actually purchased  
22 Nutella.

23 MR. LANGONE: They did, and I have signed  
24 affidavits from all my clients that I'm prepared to  
25 file if given leave. I didn't want to just file

1 without leave. That was an oversight. My clients had  
2 thought they had made that claim when they signed the  
3 objection. So there was an error. But I do have  
4 signed affidavits, and I could file them today with  
5 leave, that they all bought jars of Nutella.

6 THE COURT: I'll accept your representation  
7 that they are with you and can be filed.

8 Go ahead.

9 MR. LANGONE: Your Honor, so the two points  
10 that we want to make on this is, first, we did submit  
11 an affidavit from Dr. Freehof. We are not trying to  
12 submit it, obviously, given the Court's comments on  
13 Daubert, as an expert, but I think that just as a  
14 plain reading and as evidence the Court can take to  
15 change the phrase from an example of a "tasty yet  
16 balanced breakfast" and replacing it with "turning a  
17 balanced breakfast into a tasty one" might have some  
18 significant value to the defendant in giving a kind of  
19 a judicial stamp of approval to its advertising  
20 campaigns, and I think that gets to be a questionable  
21 kind of --

22 THE COURT: The Court isn't approving  
23 advertising today, and I'm not being asked to approve  
24 particular ads. That wasn't made part of the  
25 settlement.

1 MR. LANGONE: If the junction is approved and,  
2 arguably, if anyone tries to make a claim,  
3 subsequently, that somehow that this is deceptive --  
4 for instance, for the reasons Mr. Greenberg and  
5 Dr. Freehof state, they would be barred presumably  
6 because the defendant would point to the Court and say  
7 this is pursuant to an injunction.

8 THE COURT: All the injunction does is say  
9 this is what I'm prepared to do. It doesn't require  
10 the Court to give its imprimatur and say: I agree;  
11 Oh, there is no way this is deceptive; or, It passes  
12 muster. All they are asking is approval of that.  
13 They are going to agree to make certain changes.  
14 That's all that it is.

15 Look, ultimately, on the injunctive relief,  
16 the question isn't: Is it the best? Is it perfect?  
17 I could have thought of lots of ways that I might have  
18 done this differently, including using the agency in  
19 New York that reviews advertising. That's not what  
20 they agreed to.

21 The question for settlement purposes and  
22 looking at injunctive relief in these cases isn't  
23 whether it's the best relief, but: Does it provide a  
24 benefit?

25 MR. LANGONE: And the only other point I want



1 to make on the injunctive relief is that as to the  
2 value, it's our position, following the Ninth Circuit  
3 guidance in Bluetooth, that -- obviously, we realize  
4 is not binding on this Court, but what we think the  
5 Court might be persuaded by is to look at the total  
6 package deal of all the cash the defendant is willing  
7 to pay. So if they are willing to pay 3 million in  
8 attorneys' fees on the injunctive side and 2.5 million  
9 as a pot to go to the class, that's really a  
10 5.5-million-dollar pot of money that could be going to  
11 the class. And the Ninth Circuit said that you should  
12 look at it as a package deal in assessing a common  
13 fund; that you shouldn't just look at the portion that  
14 the parties say: We'll call this the fund, and this  
15 is the attorneys' fees -- the whole cash benefit that  
16 could potentially go to the class.

17 And this brings up the issue of reverter, and  
18 I don't want to get ahead of that. But just in terms  
19 of value, it's our position that the value of the  
20 injunctive relief to the class is at least 3 million  
21 to the extent that the class has any right to lay a  
22 claim to those attorneys' fees; and under the general  
23 law, under fee shifting statutes --

24 THE COURT: That's assuming I would agree that  
25 it even has a 3-million-dollar value. I haven't

1     gotten there yet.

2             MR. LANGONE:   That's the only other point I  
3     want to make, that we do take the position it's a  
4     package deal, your Honor.

5             THE COURT:   Thank you.

6             Yes, Mr. Levy.

7             MR. LEVY:    May I address the Court?

8             THE COURT:   Yes.

9             MR. LEVY:    Thank you, your Honor.

10            I do want to point out some other problems  
11     with the non-cash part of the settlement.

12            When the complaint was filed, they asked for  
13     Ferrero to take the bad labels and jars off the shelf.  
14     That's not part of the settlement.   We had a Campbell  
15     settlement before Judge Simandle, and the defendants  
16     did recall the Campbell soups with the bad labels.  
17     Here they can stay on the shelf.

18            Moreover, the images of the Nutella labels, as  
19     they appear on the TV ads, print ads, and websites,  
20     are going to stay the same with the same deceptive  
21     allegedly statements on them.

22            The commercials are being rotated off.   Now,  
23     as your Honor knows, commercials get stale.   They will  
24     be rotated off anyway.   Now they are going to get  
25     rotated off; and in three years they could come back

1 in the present form under at the settlement.

2 So I think there are a lot of problems with  
3 the non-cash element of the settlement. I don't think  
4 they are worth very much at all.

5 One more thing.

6 Your Honor appears to be willing to cut the  
7 fees and treat that separately than the total  
8 settlement. That does not help the class at all, your  
9 Honor.

10 THE COURT: You are going back to whether we  
11 have a fair and reasonable settlement for the class.  
12 Think you made your arguments. I'm going to rule on  
13 that.

14 MR. LEVY: On the structure, the way the whole  
15 thing is structured.

16 THE COURT: Okay.

17 MR. LEVY: And let me say I've been doing this  
18 for 40 years. This is the First Class settlement I've  
19 objected to. There is a major issue here because  
20 there is very unique leverage here. The defendants  
21 had this California case -- basically, the same facts  
22 as the New Jersey case. The motion to dismiss was  
23 denied in California. There was a class certified  
24 just for the California consumers, which means they  
25 would have faced, and they were facing --

1           THE COURT: I don't want to deal with the  
2 California case. I can't tell you what I would have  
3 decided there. But I'm going to make some comments  
4 about the case itself and the claims and to the extent  
5 you -- I know that you wanted to be in New York. I'm  
6 going to just talk about the New Jersey Consumer Fraud  
7 Act. That's the only thing I have before me.

8           MR. LEVY: Right. And the point I was trying  
9 to make, and I did make it in the first few pages of  
10 my objection, is they were facing a federal suit in  
11 Florida, a federal suit in New York, a federal suit in  
12 California, a federal suit in New Jersey. The motion  
13 to dismiss in California has been denied. The class  
14 had been certified. They were in a very tough  
15 situation.

16           There is a lot of leverage on class counsel  
17 here because they needed a nationwide class, and they  
18 use that leverage to structure a settlement that did  
19 not benefit the class as much as themselves.

20           (Continued on the next page.)

21       ///

22

23

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25

1 THE COURT: Thank you, Mr. Levy.

2 Mr. Guglielmo.

3 MR. GUGLIELMO: Your Honor, I'll start off by  
4 responding to Ms. Ades' counsel, Mr. Levy.

5 We reached a settlement in principle, as we  
6 set forth in our papers; and, as we told Mr. Levy  
7 before, the class was certified in California. He  
8 should check the dates.

9 Also, I guess he doesn't really appreciate, I  
10 guess, the fact that we have -- as the Third Circuit  
11 in De Beers recently recognized, you have an  
12 injunction which we are asking for to prohibit Nutella  
13 from utilizing the advertisements that were identified  
14 in our complaint, that were identified as part of the  
15 settlement agreement. If they go back and try to air  
16 those within the three-year period of the effective  
17 date, any class member or counsel, which we would do,  
18 would come in here and ask you to hold them in  
19 contempt. De Beers specifically recognizes that as  
20 some value.

21 In fact, in Mr. Levy's Campbell's case, he  
22 tried to get a temporary restraining order to prevent  
23 Campbell from further airing his ads, and he was  
24 unsuccessful. But in his settlement he has the same  
25 provisions we have here. I won't get into sort of the

1     hypocrisy of his objections.

2             To respond to Mr. Greenberg, he says in his  
3     objection that he did not find the statements on the  
4     labels or the advertising offensive in the first  
5     place. So if it was up to him, there wouldn't be a  
6     case here saying that the advertising was false and  
7     misleading.

8             The Williams v. Gerber case, which we have set  
9     forth --

10            THE COURT: By the way, it wasn't quite what  
11     he said.

12            MR. GUGLIELMO: He said he didn't find them  
13     offensive. If Mr. Greenberg or Mr. Langone don't  
14     think that the corrected or new advertising is somehow  
15     misleading now, they could simply file a new case if  
16     they like. There is no bar order, your Honor, to  
17     address that other issue prohibiting class members who  
18     would be purchasers in the future, obviously, because  
19     we have a defined class from 2008 to the date of  
20     preliminary approval in 2012. If the new ads come  
21     out, people think they are false and misleading, we or  
22     other lawyers could file another action.

23            With respect to the injunctive relief, which  
24     everyone seems to -- the objectors seem to argue is  
25     valueless, your Honor, I just want to point out that

1 we have obtained a complete cessation of the ads that  
2 we identified in the complaint. The three ads we  
3 identified were aired nationwide; and based on our  
4 allegations, we allege that those ads were false and  
5 misleading because they imply to consumers that  
6 Nutella was a healthy product when in fact all it is  
7 is a tool to enable moms and dads to get their kids to  
8 eat healthy foods.

9 So we have a cessation of the ads at issue.  
10 They can't make the representations that were in the  
11 ads. They can't re-air those ads for three years.

12 The statements on the labels we changed. We  
13 developed the changes in conjunction with Peter  
14 Wright, who was our advertising marketing expert who  
15 submitted a declaration. And, your Honor, I won't go  
16 into detail what Mr. Wright sets forth in paragraphs  
17 14 and 15 when he talks about the changes on the  
18 labels and in the advertisement.

19 He talks about the television ads, and he says  
20 that the television ads avoid making an explicit or  
21 implied claim that Nutella is in and of itself  
22 nutritious, a nutritious addition to a breakfast.  
23 They have said: Confine the claim to the more valid  
24 representation that Nutella can be added to an  
25 nutritious breakfast to make it tastier and more

1 appealing to family members. These are part of his  
2 opinions.

3 THE COURT: I know those are his opinions.  
4 I'm not making findings today about what would have  
5 happened if that was the report going forward in the  
6 case. That's not the role I play. I understand those  
7 are there. Certainly, I appreciate that when you talk  
8 about what does an ad look like, is it deceptive or  
9 not, we can get into a lot of discussion, and we are  
10 not; and, as I made clear to the objectors, I'm not  
11 ruling on whether those ads are fair or not, whether  
12 they would survive a challenge. I'm making that clear  
13 to everyone today. I'm not being asked to rule upon  
14 that.

15 I think you've said it today. If someone  
16 wants to challenge those in the future because they  
17 think once they make their way to the market, that  
18 somehow they are violative of some statute, some rule,  
19 there is no ruling today that bars anyone from doing  
20 so. Ferrero has not bought that protection through  
21 this settlement. So that's clear as well. I put that  
22 out there.

23 Look, I've already said in my comments: Is  
24 this perfect injunctive relief? No. Are there better  
25 ways it could have been done, perhaps, as I said,



1     instead of involving plaintiff's counsel and  
2     Mr. Wright?

3             I think I've done this in other cases, in  
4     settling Lanham Act cases, using the -- what's that  
5     advertising agency? NAD? Using them would be a great  
6     way to go about it. That's not what you agreed to.  
7     I'm looking at what I've got today.

8             That's one of the ways of dealing with the  
9     advertising and agreeing to be bound by that. They  
10    are not taking product off the shelves.

11            By the way, that goes to the cost of this as  
12    well to them. You put out their numbers, and I'll  
13    address that in a little bit as well, what it's going  
14    to cost Ferrero. They don't have to remove any  
15    product. They are allowed to sell product. As they  
16    sell new product to retailers and it makes its way on  
17    the shelf, when the retailers exhaust its supply of  
18    inventory, that it makes its way, so that's not an  
19    extra cost other than the fact they have to make up  
20    new labels. They have to make up new labels for the  
21    existing language, too.

22            Commercials do get recycled. The same  
23    commercial doesn't air for two years generally. So at  
24    some point they would have been revamping commercials  
25    as well. So I will put out there -- and this will go

1 to the value of the injunctive relief and ultimately a  
2 fee, but that certainly, as well, the cost to Ferrero  
3 is not, I believe as you have represented, in the  
4 millions. Indeed, I have nothing in the record to  
5 support that, and I have nothing, obviously, because I  
6 have stricken the Johnson report as to the value.

7 So I am looking more at -- assuming that,  
8 assuming that there was unlawful advertising or  
9 labeling, assuming -- because we are not reaching a  
10 determination today, is there a value to injunctive  
11 relief that changes that in some fashion, that there  
12 is at least an argument, makes it clearer to the  
13 consumer what they are buying and what they are  
14 getting? That's where we are.

15 MR. GUGLIELMO: Your Honor, one brief comment  
16 in response to Mr. Greenberg's other arguments: The  
17 Merola v. Atlantic Ridgefield case, 515 F.2d 165,  
18 basically says that when you have non-monetary types  
19 of relief, the District Court must bring up an  
20 informed economic judgment to bear in assessing its  
21 value. In that instance, that case, the plaintiff's  
22 expert wasn't reliable in terms of calculating the  
23 value of injunctive relief was, so the District Court  
24 used his or her economic judgment and then valued it,  
25 and the Third Circuit said that was appropriate.

1 I think I've addressed Mr. Greenberg's and  
2 Mr. Langone's -- by the way, your Honor, one point on  
3 Mr. Langone.

4 As Mr. Cecchi said, they didn't properly set  
5 forth they were class members. The deadline to object  
6 has passed. So just for preserving the record, we  
7 would say whatever submission they put forth today is  
8 still untimely.

9 THE COURT: All right. Then I know there are  
10 objector arguments to the fees, both the percentage of  
11 the common fund as well as the fee being requested for  
12 the injunctive relief. I have papers on this.

13 Does anyone want to add anything else on the  
14 record?

15 Yes, Mr. Levy.

16 MR. LEVY: Your Honor, you apparently divided  
17 up approving the 2.5 million part and then addressing  
18 fees and probably reducing the fees.

19 Let me just tell you the fee reduction does  
20 not help the class the way this is structured. So I  
21 am urging your Honor to reject the settlement because  
22 you can't modify it so any reduction in the fees  
23 benefits the class.

24 If class counsel gets 1 million instead of  
25 3 million, that 2 million gets added to what the class

1 gets; and then in the new settlement they are not  
2 restricted to the four jars. They would get a better  
3 benefit.

4 THE COURT: Frankly, this class is getting a  
5 good benefit. You can say better, maybe, in some  
6 hypothetical world. But I must tell you I have  
7 serious doubts whether this case would have survived  
8 motion practice under my reading of the New Jersey  
9 Consumer Fraud Act. I'm sure you have looked at some  
10 of the opinions I've written in this area. Maybe you  
11 haven't. You don't practice here in New Jersey. But  
12 I do take seriously the requirements under the Act and  
13 ascertainable loss and causation -- putting aside  
14 whether there was an unlawful conduct here, just put  
15 that aside for the moment without assessing the  
16 advertising was going to be a major impediment. I  
17 never got to the motion to dismiss because this was  
18 settled in the interim. I am telling you that under  
19 the New Jersey Consumer Fraud Act, and that weighs  
20 heavily here.

21 MR. LEVY: Two points, your Honor:

22 One, you appear to be saying it's such a weak  
23 case the class is lucky they got anything. If that's  
24 the case, they shouldn't have brought the case and  
25 they didn't deserve a fee for bringing such a bad

1 case.

2 THE COURT: You brought one, too.

3 MR. LEVY: And I disagree with your views of  
4 the case.

5 THE COURT: That's fine.

6 Look, I'm going to put this out there. I'm at  
7 the point now -- other than, perhaps, Mr. Greenberg  
8 who's already said: I don't want anything out of  
9 this; I was a purchaser; I'm basically a pro se lawyer  
10 objector here; I'm doing this on ideological grounds,  
11 or whatever else he may want to get out of this, what  
12 psychological goodies he wants, or in his practice --  
13 but we are at the point of having other class action  
14 plaintiffs' counsel come in here who want something  
15 clearly for their clients as well or want an action on  
16 their own. I get that. But I will assess this, and I  
17 will do it in a reasoned opinion you will hear in a  
18 few moments. But I disagree strongly. And today,  
19 guess what? I'm the Judge.

20 MR. LEVY: Your Honor, you are always the  
21 Judge. Thank you.

22 THE COURT: Okay. Thank you.

23 Yes, Mr. Greenberg.

24 MR. GREENBERG: I would just like to echo  
25 that, your Honor. I just say, respectfully, there are

1 pretty profound Rule 23 concerns about the fairness,  
2 reasonableness, and adequacy of this largely because  
3 of what Bluetooth calls the kicker, the way that it's  
4 set up; so that even if there were a reduction in  
5 attorneys' fees, it still couldn't redound to the  
6 benefit of the class. I regard that as a very serious  
7 concern.

8 Of course, Bluetooth does as well. Bluetooth  
9 says that's a sign that class counsel has paid too  
10 much attention to its own interests and not enough  
11 attention to the interests of the class. There are  
12 other signs that are both contained in Bluetooth and  
13 in the settlement that suggests class counsel paid too  
14 much attention to its own interest and not enough  
15 attention to the interest of the class.

16 THE COURT: Mr. Greenberg, how do you deal  
17 with the fact, though, as I will ultimately opine, --  
18 I think Mr. Levy put it right out there -- that this,  
19 I think -- and you really in your own papers suggested  
20 as well when you say: Who was fooled by these ads?  
21 -- that this is, I believe, a weak case.

22 So while everyone would like to say, Let's not  
23 put it in the pockets of the lawyers, -- and I may not  
24 be putting it in the pockets of the lawyers. You'll  
25 hear in a few moments -- but saying, Let's have that

1 redound to the benefit of the class, the question  
2 remains: What is fair to the class? And is what is  
3 being suggested as the fund fair to the class based on  
4 that assessment?

5 Thank you.

6 MR. GREENBERG: Did you want me to answer that  
7 or no?

8 THE COURT: I think that was kind of  
9 rhetorical on my part.

10 MR. GREENBERG: Thank you, your Honor.

11 MR. LANGONE: May I, briefly, your Honor?

12 THE COURT: Yes.

13 MR. LANGONE: I know the Court has obviously  
14 stated multiple times you've read the papers. I do  
15 want to address the reply on the Brytus and the Bogart  
16 cases, which is the Third Circuit precedence we cite  
17 about the use of the common fund doctrine as an  
18 equitable doctrine when counsel are being paid their  
19 lodestar in full, and in here, actually, getting a  
20 windfall on their lodestar, which is already coming in  
21 at these higher than usual rates.

22 THE COURT: I haven't ruled yet -- have I? --  
23 on what they are going to get as their fee. I  
24 appreciate that's your argument if they were to get  
25 everything they requested.

1 MR. LEVY: Plaintiffs' counsel, class counsel,  
2 says these Brytus and Bogart cases actually support  
3 them because the agreement is not made pursuant to fee  
4 shifting, although the only plausible agreement that  
5 the defendant could make, other than, I guess, just  
6 giving out money to plaintiffs' counsel to pay a fee,  
7 would be pursuant to fee shifting.

8 So when there is fee shifting and there is a  
9 fiduciary duty to the class by class counsel,  
10 certainly I think it would be a breach of fiduciary  
11 duty to say to a client: I'm going to take my fee out  
12 of your portion rather than petition or achieve my  
13 relief under the statutory fee shifting.

14 So I don't think the Brytus and Bogart aid  
15 class counsel. I think they squarely hold that it  
16 would be unjust to take the money out of the class's  
17 fund when class counsel are getting paid. If the  
18 Court makes an award on the lodestar, that they would  
19 be paid in full or in excess of 1.8 million pursuant  
20 to the 3 million portion, then the class is not being  
21 unjustly enriched at anybody's expense. And since the  
22 common fund doctrine is solely an equitable doctrine  
23 to prevent unjust enrichment, it couldn't be applied  
24 to reduce the 2.5 million.

25 Also, the class was, in our position, not



1 given adequate notice of the fee petition against the  
2 2.5 million. That might not apply to the fees  
3 requested as part of the injunctive relief because  
4 under 23(b)(2), they wouldn't necessarily need a  
5 notice for that.

6 THE COURT: The notice was adequate, and I  
7 will find that.

8 MR. LEVY: And then, finally, although the  
9 Court can't modify the agreement, I know from other  
10 cases courts have asked the defendant if they would  
11 agree to a modification of the condition of approving  
12 it, and we would ask that the Court see what the  
13 defendants' position is if the Court does reduce the  
14 3 million fee, if the defendant is going to insist on  
15 enforcing that kicker provision or would the defendant  
16 allow that money, any reduction, to go to the class  
17 pot, as we believe would be proper. And, obviously,  
18 the Court can't red-line the settlement agreement but  
19 has to go up or down on that portion.

20 But there are cases where the defendant would  
21 agree as a condition of approval to make  
22 modifications, and we would ask that the defendant  
23 consider that, if that's the way the Court thinks it  
24 might be appropriate in this case.

25 Thank you very much.

1           THE COURT: Mr. Eggleton, he's inviting you to  
2           make a response.

3           MR. EGGLETON: Your Honor, Keith Eggleton  
4           again.

5           I'm happy to rest on the papers unless you  
6           have any questions for me.

7           THE COURT: You don't want to take up the  
8           invitation to add some money to the class?

9           MR. EGGLETON: I would put that under the  
10          heading: Everyone's got a better idea, your Honor.

11          I would like to say on the record it was a  
12          privilege to me personally to know Judge Politan. He  
13          did a good job on this case as he does on all cases.

14          Other than that, your Honor, I will rest on  
15          the papers.

16          THE COURT: Thank you.

17          Mr. Cecchi, do you want to address the fees?

18          MR. CECCHI: I do, your Honor.

19          I first want to say any class member who  
20          doesn't like this settlement, they can opt out. They  
21          don't have to submit a claim. They can just opt out  
22          of the settlement; and if Mr. Langone doesn't like it,  
23          he can have his clients opt out.

24          THE COURT: I don't think she's opted out as  
25          of yet.

1 MR. CECCHI: I don't think so. I mean, if  
2 it's such a bad deal, they shouldn't take it. They  
3 should go and do whatever they want to do.

4 You've heard a lot about the fairness of the  
5 monetary component. I want to first talk about the  
6 process and then ultimately what I think is the core  
7 issue for your Honor to decide on this fee.

8 First, the process was -- the core of this  
9 case was about the ads and the advertising, which we  
10 contended to be false and misleading, those ads at  
11 that point in time.

12 For better or for worse, we moved as fast as  
13 we could. We had some obstacles -- not only law, and  
14 unlike some others in the courtroom, I do practice in  
15 this jurisdiction. I do practice before your Honor.  
16 I am aware of your Honor's jurisprudence. And  
17 whenever you are trying to get a settlement or  
18 determining whether or not you are going to take a  
19 case to trial, you have to access the jurisdiction,  
20 the venue, the judge.

21 I was before your colleague, Judge Chessler,  
22 recently, and he said to me: You know, you're not  
23 before Judge Hochberg anymore. And let's be candid,  
24 because we're talking about fairness and we're talking  
25 about money. I passed Justice Brennan's portrait. If

1     you are before Justice Brennan, he's got a  
2     jurisprudence that's, let's say, to the left; you can  
3     assess the case differently than if you are before a  
4     judge you believe is more in the middle or slightly to  
5     the right. And I say that --

6             THE COURT: Although I take a little umbrage  
7     with the notion of putting this as a philosophy,  
8     Mr. Cecchi, left, right, or being liberal, about a  
9     different policy or a statute. What I think we are  
10    really talking about is, I've written on the area of  
11    New Jersey Consumer Fraud Act. I've written about  
12    ascertainable loss. But I take a little umbrage with  
13    the way you presented it.

14            MR. CECCHI: No, Judge, then my analogy is not  
15    a good one. Left, right, all I'm trying to say is: I  
16    know your Honor's jurisprudence, and as did Judge  
17    Politan. We assessed that. There are other judges in  
18    the district, is a better way of putting it, who have  
19    gone different ways. The Mercedes case: Slightly  
20    different analysis of the Consumer Fraud Act. So if  
21    my comments were not appropriate because I was just  
22    trying to make the point, I do know your Honor's  
23    jurisprudence.

24            So let's then talk about whether or not this  
25    is a good deal, a fair deal. On the monetary

1 component, it absolutely is. The way we negotiated  
2 this deal is, we focused on the injunctive relief.  
3 Your Honor came up with an idea about the NAD. I  
4 confess, we didn't think of that when we were  
5 negotiating the settlement. But we did think it was a  
6 good idea to have our expert review the future  
7 advertising. Whether or not anybody agrees or  
8 disagrees, that's for the future. But we felt that  
9 changing these ads was the heart and soul of this case  
10 because of our awareness of the risks. So we  
11 negotiated the injunctive relief. Then we negotiated  
12 a cash settlement, which, as it turns out, is hugely  
13 beneficial to the class.

14 And, again, Judge, I really do apologize for  
15 making a poor analogy. My point only was about risk.  
16 You have to assess your risk when you are coming up  
17 with a package. On that point, I can't be more humble  
18 than saying I didn't want to give umbrage to your  
19 Honor, and I hope you accept my sincere comments about  
20 it because I do feel a little emotional about this  
21 case, as I know your Honor does, because we worked  
22 hard on this case.

23 There were other lawyers in California who put  
24 a lot of obstacles in our path. There was an MDL  
25 proceeding. There were depositions. We worked with

1 our experts. So a lot of work did go into the case,  
2 and that gets to the point ultimately.

3 This injunction has value. It's a benefit to  
4 this class going forward. It has real value. We  
5 think it improved. Our expert did think it improved.  
6 Could it have been better? Absolutely. That's always  
7 the case in a settlement. It always can be better.

8 So, ultimately, all we ask your Honor is, even  
9 going back to your comments, which we started with  
10 about rates -- some of the rates are high, but you  
11 know various jurisdictions rates, we don't even have  
12 to focus on that. Because what I'm going to ask your  
13 Honor to do is just tell us what you think is fair for  
14 what we accomplished here, and, at the end of the day,  
15 we are comfortable with that. We accept that.

16 Do I think our request reflects a fair number  
17 that we negotiated after we negotiated everything else  
18 under Judge Politan's supervision? Do I think it's a  
19 fair compensation? Indeed, I do. I wouldn't have  
20 asked your Honor for it if I didn't think it was fair.  
21 But if your Honor doesn't think it's fair and  
22 reasonable, I respect that, I appreciate that, and we  
23 are going to live with that. But we take these cases.  
24 There is always risk in these cases getting nothing.  
25 And if the multiplier is two or three or 3 1/2 in the

1 cases, that's a reflection of the risk.

2 We've spent our own money on these cases, our  
3 own time, and sometimes we get nothing. I have been  
4 at that Larsen case for a long time, and we are going  
5 to be at this case for a long time afterward, your  
6 Honor, because these objectors, we know them well. We  
7 know them all. We know Mr. Greenberg. We know  
8 Mr. Langone. We will be litigating in the Third  
9 Circuit a year from now and even longer than that. I  
10 have been litigating the Larsen case for years, and  
11 the fee that you grant today, whether it's the full  
12 fee, which I hope we will get, or less, we will be  
13 working on this case in a year from now, and there  
14 will be no more payment to us.

15 So we achieved I think the best we could have  
16 in these circumstances. I think it's fair. And I  
17 think, ultimately, did we earn the fee that we  
18 requested? I think we did earn it. We all worked  
19 hard. We are all professional members of the bar. We  
20 are all good at what we do. And I do want to step  
21 back and, again, say, Judge, my comments are just  
22 that. I appreciated the risks. I knew this was a  
23 difficult case.

24 Do I think I could have convinced your Honor?  
25 Yes. But I thought that in other cases before your

1 Honor, too, and I was wrong in those cases; and you  
2 have to take that into consideration when you settle a  
3 case.

4 So I don't think I can say anything more other  
5 than I think we earned it. I think it's fair. I  
6 think, ultimately, that's the analysis your Honor has  
7 to undertake.

8 Thank you.

9 THE COURT: Thank you.

10 It's kind of interesting, Mr. Cecchi, when you  
11 said, too, We'll be litigating this a long time in the  
12 Circuit, frankly, this is the first time that I have  
13 had these objectors in one of my class action  
14 settlements, and I've never had an appeal taken from  
15 one of mine, but there is always a first, and I'm  
16 ready for it.

17 MR. CECCHI: I'm sure you are. I'm a betting  
18 man. I'm going to think whatever you rule there is  
19 going to be an appeal.

20 THE COURT: All right.

21 I have actually prepared fairly lengthy  
22 remarks, so sit back and relax.

23 Before the Court are motions by plaintiffs  
24 Marnie Glover, and I'll refer to her as "Glover," and  
25 Jayme Kaczmarek collectively, the "plaintiffs," to



1 certify the class and grant final approval of the  
2 parties' settlement pursuant to Federal Rule of Civil  
3 Procedure 23; and an application for an award of  
4 attorneys' fees; reimbursement of expenses; and  
5 approval of incentive awards pursuant to 23(h).

6 Defendant Ferrero USA, Inc., who I'll refer to  
7 as either "defendant" or "Ferrero" in this opinion,  
8 markets Nutella hazelnut spread.

9 Plaintiffs allege on behalf of themselves and  
10 a putative nationwide class, with the exception of  
11 those who purchased in California, that defendant  
12 deceptively marketed Nutella as a healthy food.

13 Defendant has joined plaintiffs in moving for  
14 final approval of the proposed settlement, and this  
15 settlement would resolve all claims asserted against  
16 defendant arising from plaintiffs' complaints.

17 The facts I am going to set forth now are  
18 based on the allegations in plaintiffs' complaints.

19 On February 27th, 2011, Glover filed an action  
20 in this district bringing claims on behalf of a  
21 nationwide class under the New Jersey Consumer Fraud  
22 Act: breach of contract and breach of express and  
23 implied warranty.

24 Plaintiffs' cause of action arises from her  
25 allegations that defendant deceptively marketed its

1 Nutella product as a healthy and nutritious component  
2 of a well balanced breakfast without explicitly  
3 stating that the true nutritional values come,  
4 instead, from the other foods or drinks -- for  
5 example, whole grain breads, fruit, and milk that are  
6 advertised along with Nutella.

7 Grover alleged that Ferrero made such  
8 representations in print, television, and  
9 point-of-sale advertising as well as on the label of  
10 the product to plaintiffs and other consumers during  
11 the class period.

12 On April 11, 2011, plaintiff Glover filed a  
13 motion with the Judicial Panel on Multidistrict  
14 Litigation requesting centralization of this action  
15 and a putative class action pending in California  
16 alleging similar claims. That was the In re Ferrero  
17 Litigation case in the Southern District of  
18 California. That motion was brought under 28 U.S.C.  
19 Section 1407 for pretrial proceedings in this district  
20 where Ferrero was headquartered and where it conducted  
21 the majority of the activities complained of in the  
22 actions. That received MDL No. 2248.

23 The motion for centralization was denied  
24 following oral argument held on July 28, 2011, and the  
25 panel found as follows -- and I'll quote from their

1 opinion at 804 F. Supp. 2d 1374:

2 "The actions may share some factual questions  
3 regarding the common defendants' marketing practices,  
4 but these questions do not appear complicated.

5 Indeed, the parties have not convinced us that any  
6 common factual questions are sufficiently complex or  
7 numerous to justify Section 1407 transfer at this  
8 time."

9 In the interim, on May 2, 2011, the plaintiffs  
10 in the Southern District of California action, Athena  
11 Hohenberg and Laura Rude-Barbato, who I'll refer to as  
12 "proposed intervenors," sought to intervene in the  
13 Glover action for the purpose of having it dismissed.  
14 Glover opposed that motion.

15 Meanwhile, Ferrero filed a motion to dismiss  
16 pursuant to Rule 12(b)(6).

17 While those motions were pending, plaintiff  
18 Kaczmarek filed her complaint on July 26, 2011,  
19 asserting similar claims based upon the same conduct  
20 alleged in Glover's complaint.

21 On August 23, 2011, Kaczmarek sought  
22 consolidation of her complaint and Glover's complaint  
23 with the appointment of Scott & Scott LLP and Carella,  
24 Byrne, Cecchi, Olstein, Brody and Agnello, the Carella  
25 firm, as interim lead counsel.

1           On September 6, 2011, the Court granted the  
2     request for consolidation under the caption: "In re  
3     Nutella Marketing and Sales Practices Litigation," and  
4     appointed Scott & Scott and Carella as interim lead  
5     counsel. I'll refer to them as "class counsel for the  
6     putative class."

7           The Court terminated defendant's motion to  
8     dismiss and set deadlines for plaintiffs to file a  
9     consolidated complaint and for defendant to refile its  
10    motion to dismiss thereafter.

11          On September 9, 2011, proposed intervenors  
12    filed a second motion to intervene for the purpose of  
13    filing a motion to dismiss both the Glover and  
14    Kaczmarek actions pursuant to the first-filed rule.

15          The Court denied both motions to intervene on  
16    October 20, 2011.

17          During this time, the parties agreed to  
18    mediate before the late Honorable Nicholas J. Politan,  
19    a former United States District Court Judge in the  
20    District of New Jersey. These sessions resulted in  
21    the settlement which is before the Court today.

22          On January 10, 2012, plaintiffs filed a motion  
23    for preliminary approval of the settlement. I granted  
24    that motion and preliminarily certified the class and  
25    approved notice to the class.

The terms of the settlement are memorialized in the class action settlement agreement, and the Court has reviewed those terms in full.

The putative class is defined as "all persons throughout the United States who purchased one or more of defendant's Nutella brand hazelnut spread products in any state other than California at any time from January 1, 2008, through the date of preliminary approval, February 3, 2012, the class period, other than for resale or distribution.

"Excluded from the settlement class members are Ferrero, defense counsel, any judge presiding over any of the actions that together comprise the actions or related actions, or any immediate family members of any such persons."

The settlement is divided into two parts:  
money payment to the class for alleged past damages  
and an injunction related to Nutella's marketing and  
advertising to prevent alleged future harms.

Under the terms of the settlement, the parties have agreed that defendant will pay \$2,500,000 for distribution to settlement class members who submit a valid claim form.

Settlement class members can submit a claim  
for up to \$4 per jar purchased during the class period

1 up to a maximum of five jars for a total of \$20  
2 subject to pro rata reduction based on the total  
3 number of claims filed.

4 Second, the parties have agreed to address the  
5 advertising the plaintiffs allege is deceptive.  
6 Defendants will revise its labeling and print and  
7 media advertising to reflect the changes agreed to as  
8 well as modify the content on the website for Nutella.  
9 In particular, defendant is revising Nutella's label  
10 by adding more nutritional information on the front of  
11 the package regarding sugar and fat content of the  
12 serving.

13 It is changing its slogan from "An example of  
14 a tasty yet balanced breakfast" into "Turn a balanced  
15 breakfast into a tasty one." These changes are to  
16 last at least two years.

17 In addition, defendant will not use  
18 potentially misleading commercials for three years and  
19 has revised its commercials based on input from class  
20 counsel. Defendant has altered its website removing  
21 information plaintiffs allege was potentially  
22 misleading.

23 Plaintiffs submitted a declaration by Peter  
24 Wright who claims to be an expert on consumer behavior  
25 and marketing practices. Mr. Wright opines that

1 Ferrero's new advertising campaign "will effectively  
2 educate reasonable consumers about how to do  
3 practical, balanced and nutritional breakfast planning  
4 which may or may not include Nutella." Wright  
5 declaration at paragraph 13.

6 The Court appointed Rust Consulting -- I'll  
7 refer to it as "Rust" -- as the claims administrator.  
8 Through Rust's efforts, notice of the claim and  
9 settlement were published in the following magazines:  
10 Parents, the May 2012 issue; People, April 16th, 2012  
11 issue; Ser Padres, May 2012 issue; and Women's Day,  
12 May 2012 issue -- which were the same magazines that  
13 ran defendant's allegedly deceptive advertising  
14 campaign.

15 In addition, notice of the claim and  
16 settlement were published on the following websites:  
17 24/7 Real Media Network, Parenting Channel, and  
18 Facebook.

19 Rust also established a dedicated settlement  
20 website, the Settlement Website,  
21 WWW.Nutellaactionsettlement.com, which contains  
22 the settlement agreement, class notice, and  
23 information relating to filing a claim on that, opting  
24 out of the settlement, objecting to the settlement,  
25 deadlines relating to the settlement, frequently asked

1 questions, and other information relative to the  
2 settlement. The settlement website also contains an  
3 electronic claim form to allow an online submission of  
4 claims as well as a claim form which can be  
5 downloaded, printed, and mailed to the claims  
6 administrator. The website is in both English and  
7 Spanish.

8 It also includes the declaration of James  
9 Cecchi in support of counsels' motion for approval of  
10 fees, which included declarations from each of  
11 plaintiffs' attorneys' fees regarding the hours and  
12 fees they claim to have accrued.

13 In response to the publication, the settlement  
14 website has been viewed over 1 million times, the  
15 internet banner notations have been viewed well over  
16 10 million times, and over 200,000 individuals have  
17 filed claims for 962,137 jars of Nutella. At \$4 a  
18 jar, the total amount of claims filed by June 29,  
19 2012, would equal well over \$3 million.

20 Of the entire class, only six individuals  
21 requested exclusion from the class. A number of  
22 objections have been lodged as well, which the Court  
23 addresses in turn.

24 I know that at this point as well that a  
25 number of the objectors had complained about the



1 cy-près provision in the settlement which would have  
2 allowed any remaining funds not collected by the class  
3 to be distributed to a charity. Those objections are,  
4 however, moot because its clear the class fund will be  
5 exhausted due to the number of claims filed.

6 As this case has not proceeded to the class  
7 certification stage, the Court has to first determine  
8 whether to certify the settlement class. The Court  
9 has already conditionally certified the class. The  
10 Third Circuit in In Re Insurance Brokerage  
11 Antitrust -- I'm going to leave out the actual cites;  
12 I'll just give the name of the case for purposes of  
13 the opinion on the record -- explained the standard  
14 for class certification in a settlement context.

15 In order to approve a class settlement  
16 agreement, "a district court must determine that the  
17 requirements for class certification under Federal  
18 Rule of Civil Procedure 23(a) and (b) are met and must  
19 determine that the settlement is fair to the class  
20 under Federal Rule of Civil Procedure 23(e)." See  
21 also Sullivan v. DB Investors. Inc., 2011 U.S. App.  
22 Lexis 25185, at 3839 (3d Cir. February 23rd, 2012.)

23 As the Supreme Court has made clear:  
24 "Confronted with a request for settlement only class  
25 certification, a district court need not inquire

1 whether the case, if tried, would present intractable  
2 management problems, for the proposal is that there be  
3 no trial. But other specifications of Rule 23, those  
4 designed to protect absentees by blocking unwarranted  
5 or overbroad class definitions, demand undiluted, even  
6 heightened, attention in the settlement context."

7 Amchem Products v. Windsor.

8 "If a fairness inquiry under Rule 23(e)  
9 controlled certification, eclipsing Rule 23(a) and  
10 (b), and permitting class designation despite the  
11 impossibility of litigation, both class counsel and  
12 court would be disarmed." Thus, it is important to  
13 "apply the class certification requirements of Rule  
14 23(a) and (b) separately from the fairness  
15 determination under Rule 23(e)." In re Prudential  
16 Insurance Company of America Sales Practices  
17 Litigation Agent Actions (3d Cir. 1998.)

18 "The requirements of Rule 23(a) and (b) are  
19 designed to ensure that a proposed class has  
20 'sufficient unity so that absent class members can  
21 fairly be bound by decisions of class  
22 representatives.'" That's the Prudential case quoting  
23 the Amchem Supreme Court case.

24 Under Rule 23(a), the prerequisites to class  
25 certification are:

1           One, the class is so numerous that joinder of  
2 all members is impracticable;

3           Two, there are questions of law or fact common  
4 to the class;

5           Three, the claims or defenses of the  
6 representative parties are typical of the claims or  
7 defenses of the class; and

8           Four, the representative parties will fairly  
9 and adequately protect the interests of the class.

10           Rule 23(a); and see *Amchem*.

11           "If all the prerequisites of Rule 23(a) are  
12 satisfied, a class action may be maintained if the  
13 standards set forth in Rule 23(b) are satisfied as  
14 well." In re Insurance Brokerage at page 257, Rule  
15 23(b).

16           Rule 23(b) requires "The Court to find that  
17 the questions of law or fact common to class members  
18 predominate over any questions affecting only  
19 individual members and that a class action is superior  
20 to other available methods for fairly and efficiently  
21 adjudicating the controversy." Amchem at 618. "Among  
22 current applications of Rule 23(b)(3), the 'settlement  
23 only' class has become a stock device."

24           The "factual determinations necessary to make  
25 Rule 23 findings must be made by a preponderance of

1 the evidence. In other words, to certify a class, the  
2 district court must find that the evidence more likely  
3 than not establishes each fact necessary to meet the  
4 requirements of Rule 23." In re Insurance Brokerage  
5 at 258. Accordingly, "class certification is proper  
6 only if the Court is satisfied after a rigorous  
7 analysis that the prerequisites of Rule 23 are met."

8 "Even if it has satisfied the requirements for  
9 certification under Rule 23, a class action cannot be  
10 settled without the approval of the Court and a  
11 determination that the proposed settlement is fair,  
12 reasonable, and adequate." In re: Prudential  
13 Insurance Company. See Federal Rule of Civil  
14 Procedure 23(e)(2) stating that "A district court may  
15 approve a proposed settlement only after a hearing and  
16 finding it is fair, reasonable, and adequate."

17 In In re: Insurance Brokerage, the Third  
18 Circuit affirmed the applicability of nine factors  
19 establish in Girsh v. Jepson, 521 F.2d 153 (3d Cir.  
20 1975), which are to be considered when determining the  
21 fairness of a proposed settlement.

22 "Where settlement negotiations precede class  
23 certification, and approval for settlement and  
24 certification are sought simultaneously, we require  
25 district courts to be even more scrupulous than usual

1 when examining the fairness of the proposed  
2 settlement." In re Warfarin Sodium Antitrust  
3 Litigation (3d Cir. 2004).

4 As stated earlier, the parties request that  
5 the settlement class consist of all persons except  
6 those in California who purchased Nutella between  
7 January 1, 2008, and February 3, 2012.

8 I'll address first the numerosity requirement.

9 First I determine whether plaintiffs have  
10 satisfied the prerequisites for maintaining a class  
11 action as set forth in Rule 23(a).

12 With respect to numerosity, a party may not  
13 precisely enumerate the class members to proceed as a  
14 class action. In re Lucent Technology, Inc.  
15 Securities Litigation, 307 F.Supp.2d 633, (District of  
16 New Jersey 2004).

17 "No minimum number of plaintiffs is required  
18 to maintain a suit as a class action. But, generally,  
19 if the named plaintiff demonstrates that the potential  
20 number of plaintiffs exceeds 40, the first prong of  
21 Rule 23(a) has been met. Stewart v. Abraham (3d Cir.  
22 2001) citing Moore's Federal Practice. Also, Leesberg  
23 v. Converted Organics (D. Del 2010).

24 Here the numerosity element is easily  
25 satisfied. No one disputes that defendant sold

1 perhaps millions of jars of Nutella throughout the  
2 United States during the period. In addition, over  
3 200,000 individuals have filed claims. Therefore,  
4 joinder of all class members is impractical.

5 Turning to commonalty.

6 Commonalty requires that "there are questions  
7 of law or fact common to the class." The threshold  
8 for establishing commonalty is straightforward. "The  
9 commonality requirement will be satisfied if the named  
10 plaintiffs share at least one question of fact or law  
11 with the grievances of the prospective class." In re  
12 Schering Plough (3d Cir. 2000), quoting Baby Neal v.  
13 Casey (3d Cir. 1994).

14 Indeed, as the Third Circuit pointed out, "It  
15 is well established that only one question of law or  
16 fact in common is necessary to satisfy the commonalty  
17 requirement despite the use of the plural 'questions'  
18 in the language of Rule 23(a)(2)." In re Schering  
19 Plough, note 10. Thus, there is a low threshold for  
20 satisfying this requirement. Newton v. Merrill Lynch  
21 (3d Cir. 2001) and In re Asbestos Litigation (3d Cir.  
22 1986).

23 "Highlighting the threshold of commonalty is  
24 not high. It is not required that all putative class  
25 members share identical claims." See Hassine v.

1 Jeffes, 846 F.2d 169 (3d Cir. 1988), and Baby Neal,  
2 stating that "Factual differences among the claims of  
3 the putative class members do not defeat  
4 certification."

5 Here the Court finds that there are common  
6 questions of law or fact shared amongst the class.  
7 Importantly, all members of the class were subject to  
8 either defendant's deceptive advertising campaign or  
9 allegedly misleading label and purchased at least one  
10 jar of Nutella.

11 All members of the class also share common  
12 questions of law -- in particular, whether they were  
13 exposed to allegedly deceptive or fraudulent messages  
14 regarding defendant's advertising and labeling,  
15 whether such deceptive messages, if any, caused them  
16 to buy Nutella, and, if so, whether they were harmed.

17 A number of objectors dispute plaintiffs'  
18 underlying claim that the messages, even if deceptive,  
19 caused them to purchase the product or caused them any  
20 harm. This, of course, goes to the merits of the  
21 claims and the damages, if any.

22 Nonetheless, the members of the class share  
23 the common questions of whether the label and/or  
24 advertising were unlawful. As such, the element of  
25 commonality is met.

1 Turning to typicality.

2 "The concepts of commonality and typicality  
3 are broadly defined and tend to merge because they  
4 focus on similar aspects of the alleged claims.  
5 Newton v. Merrill Lynch (3d 2001). Specifically, Rule  
6 23(a)(3) requires that "the claims of the  
7 representative parties be typical of the claims of the  
8 class." Rule 23(a)(3).

9 Typicality acts as a bar to class  
10 certification only when "the legal theories of the  
11 named representatives potentially conflict with those  
12 of the absentees." Georgine v. Amchem (3d Cir. 1986)  
13 and Newton.

14 "If the claims of the named plaintiffs and  
15 putative class members involve the same conduct by the  
16 defendant, typicality is established regardless of  
17 factual differences." Newton at 184.

18 In other words, the typicality requirement is  
19 satisfied as long as representatives and the class  
20 claims arise from the same event or practice or course  
21 of conduct and are based on the same legal theory.

22 As discussed above, because plaintiffs' claims  
23 arise from the same course of conduct and are  
24 predicated on the same legal theories as the claims of  
25 all other members of the class, the allegedly



1     deceptive marketing and labeling of Nutella, the  
2     typicality requirement of Rule 23(a) is satisfied.

3             Turning to adequacy of representation.

4             Class representatives must "fairly and  
5     adequately protect the interests of the class."

6     23(a)(4). This requires a determination of, one,  
7     whether the representatives' interest conflict with  
8     those of the class, and, two, whether the class  
9     attorney is capable of representing the class. Newton  
10    at 187.

11            The Supreme Court has stressed that this  
12    element "serves to uncover conflicts of interests  
13    between named parties and the class they seek to  
14    represent." Amchem at 625."

15            "Rule 23(a)'s adequacy of representation  
16    requirement serves to uncover conflicts of interest  
17    between named parties and the class they seek to  
18    represent." In re Pet Food Products Liability  
19    Litigation (3d Cir. December 16, 2010), quoting  
20    Amchem.

21            Class representatives "must be part of the  
22    class and possess the same interests and suffer the  
23    same injuries as the class members." This element  
24    also functions as a catch-all requirement that "tends  
25    to merge with the commonality and typicality criteria

1 of Rule 23(a)," citing to Pet Foods.

2 The named plaintiffs are adequate  
3 representatives for the class. Each has alleged that  
4 she was exposed to defendant's allegedly deceptive  
5 marketing and that such marketing caused her to  
6 purchase Nutella and suffer an ascertainable loss. In  
7 that regard, like all members of the class, plaintiffs  
8 faced the same challenged practices.

9 In addition, there is no evidence that  
10 plaintiffs have any interests that are antagonistic to  
11 or in conflict with the class. As such, the absent  
12 class members' interests will be protected adequately.  
13 See In re Warfarin Sodium Antitrust Litigation (3d  
14 Cir. 2014). Moreover, having reviewed class counsel's  
15 resume, the Court is satisfied that the Carella firm  
16 and Scott are experienced in prosecuting class actions  
17 on behalf of consumers.

18 Nevertheless, objector Christopher Andrews,  
19 who is not present here today, argued that class  
20 counsel has not adequately represented the class.  
21 Indeed, to some extent, I guess, Mr. Levy made the  
22 argument today as well. But Mr. Andrews complains  
23 that the settlement here is not as favorable as the  
24 one reached by counsel in the California action.

25 After reviewing the proposed settlement of the

1 California action, I find it is substantively similar  
2 to the settlement before me in this matter. Both  
3 include a monetary payment for past harm and an  
4 injunction related to defendant's marketing and the  
5 content of the Nutella label. The only significant  
6 difference is the amount of the payment and valuation  
7 of the injunction as that class only pertains to  
8 persons in California. So the amounts are naturally  
9 smaller than those here, where the class is defined as  
10 all persons in the United States.

11 In addition, the California settlement has  
12 largely identical provisions to those before me and  
13 was made a week after the settlement here.

14 Furthermore, class counsel here have indicated  
15 that California counsel tried to hinder settlement in  
16 this matter.

17 It has also been demonstrated to this Court  
18 that Mr. Andrews has been working with California  
19 counsel against class counsel here. As will be  
20 discussed later, I note here that Mr. Andrews seems to  
21 have objected only for the purpose of obtaining a  
22 significant payment from the fund or class counsel.

23 A number of other objectors complain regarding  
24 class counsel's fees, but not necessarily the fairness  
25 of the settlement itself. These concerns are outside

1 the ambit of this factor, and I will address them in  
2 turn. I find that Andrew's objection has no merit.

3 Accordingly, the Court finds that class  
4 counsel will adequately represent the interests of  
5 plaintiffs and the class.

6 Turning to the superiority requirement.

7 In addition to meeting the requirements of  
8 Rule 23(a), the class must also satisfy Rule 23(b)(3).  
9 That requires that "a class action be superior to  
10 other available methods for the fair and efficient  
11 adjudication of the controversy."

12 The rule sets out several factors relevant to  
13 the superiority inquiry:

14 A, the interests of members of the class in  
15 individually controlling the prosecution or defense of  
16 separate actions;

17 B, the extent and nature of any litigation  
18 concerning the controversy already commenced by or  
19 against members of the class;

20 C, the desirability or undesirability of  
21 concentrating the litigation of the claims in the  
22 particular forum; and

23 D, the difficulties likely to be encountered  
24 in the management of a class action.

25 Essentially, the superiority requirement "asks

1 the Court to balance in terms of fairness and  
2 efficiency the merits of a class action against those  
3 of alternative available methods of adjudication."  
4 Prudential at 316; In re Warfarin, 532, 33.

5 In this case, each of the factors weighs in  
6 favor of class certification.

7 First, the expense of individual actions in  
8 this consumer fraud action weighed against the  
9 potential recovery would clearly be cost prohibitive.  
10 Here, individual plaintiffs have alleged losses  
11 amounting to several dollars for each Nutella jar they  
12 purchased. Plaintiffs' allegations represent the high  
13 point of what they could hope to achieve individually.  
14 This is far too small of a potential recovery for any  
15 individual class member to be expected to pursue his  
16 or her own claim in a separate action.

17 In addition, to meet the requirements of Rule  
18 23(b)(3), named plaintiffs must show that common  
19 questions of law or fact predominate over questions  
20 affecting only individual class members. The  
21 predominance inquiry "tests whether proposed classes  
22 are sufficiently cohesive to warrant adjudication by  
23 representation and assesses whether a class action  
24 would achieve economies of time, effort and expense  
25 and promote uniformity of decision as to persons

1 similarly situated." Sullivan, 2011 U.S. App. Lexis  
2 at 41.

3 In determining whether common questions  
4 predominate, courts have focused on the claims of  
5 liability against defendants. See Bogosian v. Gulf  
6 Oil (3d Cir. 1997.) Indeed, the Third Circuit  
7 recently explained that "the focus of the predominance  
8 inquiry is on whether the defendant's conduct was  
9 common as to all of the class members and whether all  
10 of the class members were harmed by the defendant's  
11 conduct." Sullivan at 44.

12 Here, as stated earlier, common legal and  
13 factual questions are shared amongst the class members  
14 and plaintiffs in this action. Specifically, class  
15 members and plaintiffs challenge the same alleged  
16 improper consumer practices by defendant. As such,  
17 there are no significant individual fact issues.  
18 Rather, the determination of the legal issues raised  
19 involve a "common nucleus" of operative facts that  
20 underlies all of the claims asserted in this case.

21 Accordingly, the factual and legal principles  
22 to be addressed by plaintiffs in prosecuting these  
23 claims are sufficiently common to the entire class,  
24 thereby satisfying the predominance inquiry. See  
25 Amchem at 625.

"Predominance is a test readily met in certain cases alleging consumer or securities fraud."

(Continued on the next page.)

///

1           Having weighed all the factors and considered  
2           the requirements of class certification, the Court  
3           finds that it is appropriate to certify the class for  
4           settlement purposes.

5           In determining whether, then, to approve the  
6           class settlement, this Court is bound by Rule 23(e).  
7           "Under Rule 23(e), the district court acts as a  
8           fiduciary who must serve as a guardian of the rights  
9           of absent class members. The Court cannot accept a  
10          settlement that the proponents have not shown to be  
11          fair, reasonable and adequate." In re GMC Pick-Up  
12          Truck Fuel Tank Products Liability Litigation (3d Cir.  
13          1995).

14          In general, the law encourages and favors  
15          settlement of civil actions in federal courts,  
16          particularly in class actions. In re Warfarin at 535.  
17          See In re General Motors (3d Cir. 1995).

18          "The law favors settlement particularly in  
19          class actions and other complex cases where  
20          substantial judicial resources can be conserved by  
21          avoiding formal litigation."

22          Accordingly, when a settlement is reached on  
23          terms agreeable to all parties, it is to be  
24          encouraged. Bell Atlantic V. Bolger (3d Cir. 1993).

25          Nevertheless, a class action settlement may



1 not be approved under Rule 23(e) without a  
2 determination by this Court that the proposed  
3 settlement is fair, reasonable, and adequate. See  
4 In re Cendant, 264 F.3d at 231; 23(e)(1)(A); and  
5 Amchem, 623, noting that the Rule 23(e) inquiry  
6 "protects unnamed class members from unjust or unfair  
7 settlements affecting their rights when the  
8 representatives become fainthearted before the action  
9 is adjudicated or are able to secure satisfaction of  
10 their individual claims by a compromise." And when  
11 settlement negotiations precede class certification  
12 and approval for settlement and certification are  
13 sought simultaneously, the Third Circuit requires  
14 district courts to be even "more scrupulous than  
15 usual" when examining the fairness of the proposed  
16 settlement. See General Motors at 805.

17 This heightened standard is intended to ensure  
18 that class counsel has engaged and sustained advocacy  
19 throughout the course of the proceedings, particularly  
20 in settlement negotiations, and has protected the  
21 interests of all class members. See Prudential at  
22 317.

23 To ensure fairness, the Third Circuit has  
24 identified nine factors to consider when determining  
25 whether a proposed class action settlement is fair,

1 reasonable, and adequate; and these are, as I  
2 referenced before, the Girsh factors, and they are as  
3 follows:

4 One, the complexity, expense, and likely  
5 duration of litigation;

6 Two, the reaction of the class to the  
7 settlement;

8 Three, the stage of the proceeding and the  
9 amount of discovery completed;

10 Four, the risks of establishing liability;

11 Five, the risks of establishing damages;

12 Six, the risks of maintaining the class action  
13 through the trial;

14 Seven, the ability of defendants to withstand  
15 greater judgment;

16 Eight, the range of reasonableness of the  
17 settlement fund in light of the best possible  
18 recovery; and

19 Nine, the range of reasonableness of the  
20 settlement fund to a possible recovery in light of all  
21 the attendant risks of litigation.

22 The Court has considerable discretion in  
23 approving a proposed settlement of a class action; and  
24 in light of these principles, the Court will determine  
25 whether this settlement is reasonable.

1           Addressing the first factor, the complexity,  
2           expense, and likely duration of the litigation.

3           The first factor involves a consideration of  
4           the "probable costs in both time and money of  
5           continued litigation." In re Cendant at 233. The  
6           Court finds this factor weighs in favor of settlement.

7           It has already been determined, even by the  
8           Judicial Panel on Multidistrict Litigation, that this  
9           case does not involve complex issues. Nevertheless,  
10          it would involve discovery, trial preparation, and  
11          addressing various legal and factual issues.  
12          Therefore, this litigation, like all civil litigation,  
13          has the potential to be both time consuming and  
14          expensive for the parties. Additionally, expert  
15          discovery would be necessary, and there would be the  
16          potential need for surveys and extensive analysis of  
17          consumer conduct relating to the allegedly deceptive  
18          marketing.

19          If the case were to proceed to trial, there  
20          would be significant motion practice. Defendant had  
21          already filed a motion to dismiss although it was  
22          terminated with leave to refile after the cases were  
23          consolidated. Because defendant has been steadfast in  
24          its assertion that its message was never deceptive or  
25          fraudulent, it would undoubtedly refile its motion to

1 dismiss; and if the case were to proceed beyond that,  
2 then it would likely file summary judgment motions as  
3 well.

4 Finally, the post-trial motions and appeals  
5 process would further extend the length of the  
6 litigation.

7 Accordingly, a significant amount of money and  
8 resources would be required to pursue this litigation  
9 to a final judgment which would ultimately delay any  
10 potential payout to the class. As such, this factor  
11 favors settlement although not significantly more so  
12 than any other civil litigation matter.

13 Second, the reaction of class members.

14 As indicated, there are at least hundreds of  
15 thousand of class members nationwide. To date, the  
16 Court has received 17 objections, although a number of  
17 the objectors are related in some fashion; and  
18 distilled to their essence, there are about eight  
19 groups of objections. These objections will be  
20 addressed later in this opinion. In addition, six  
21 individuals have requested exclusion from the class.  
22 A number of objections have been made strenuously, but  
23 much of the ire is directed towards the attorneys fees  
24 and not the class settlement itself.

25 For the purpose of this factor, the few

1 objections made to the underlying settlement from the  
2 class members as compared to the potential number of  
3 class members creates a presumption that this factor  
4 weighs in favor of settlement. In re Cendant at 235.

5 "The vast disparity between the number of  
6 potential class members who received notice of the  
7 settlement and the number of objectors creates a  
8 strong presumption that this factor weighs in favor of  
9 the settlement." Indeed, under Girsh, such a small  
10 number of negative responses favors approval of a  
11 class action settlement. See Stoetzner v. U.S. Steel  
12 Corp., (3d Cir. 1990).

13 "Objections by 29 members of a class comprised  
14 of 281 strongly favors settlement." In re Prudential  
15 Insurance. "Small number of negative responses to  
16 settlement favors approval." Weiss v. Mercedes Benz.  
17 100 objections out of 30,000 class members weighs in  
18 favor of settlement. Clearly our numbers here are  
19 even more skewed.

20 Turning to the stage of proceedings and the  
21 amount of discovery completed.

22 This factor "captures the degree of case  
23 development that class counsel have accomplished prior  
24 to the settlement. Through this lens courts can  
25 determine whether class counsel had an adequate

1 appreciation of the merits of this case before  
2 negotiating." In re Cendant at 235. Even settlements  
3 reached at a very early stage and prior to formal  
4 discovery are appropriate when there is no evidence of  
5 collusion and the settlement represents substantial  
6 concessions by both parties. Weiss, 889 F.Supp.  
7 1301.

8 This case has been litigated for about a year  
9 and has involved some discovery. The parties have  
10 engaged in extensive motion practice regarding  
11 proposed intervenors' motion to intervene and  
12 defendant's motion to dismiss. In addition, the  
13 parties have propounded document requests and  
14 interrogatories, issued third-party subpoenas,  
15 reviewed over 50,000 pages of documents, hired  
16 experts, and taken two depositions.

17 Finally, and most importantly, the parties  
18 have prepared for and partook in mediation before the  
19 late Honorable Nicholas Politan in October and  
20 November 2011. Therefore, the Court finds that class  
21 counsel had sufficient information to make an informed  
22 decision regarding settlement. This factor weighs in  
23 favor of approval.

24 Turning to the risks in establishing liability  
25 and damages.

1           The fourth and fifth factors "survey the  
2       potential risks and rewards of proceeding to  
3       litigation in order to weigh the likelihood of success  
4       against the benefit of an immediate settlement." In  
5       re Warfarin at 537.

6           In other words, those factors attempt "to  
7       measure the expected value of litigating the action  
8       rather than settling it at the current time." Cendant  
9       at 237 through 239. Both factors strongly weigh in  
10      favor of approval of settlement in this case.

11          Here plaintiffs have a difficult row to hoe in  
12      proving their case. Defendant had filed a motion to  
13      dismiss; and although the Court never had the  
14      opportunity to rule on it, a review of the arguments  
15      suggest there were significant impediments to  
16      plaintiff recovering under their theories.

17          First, it is questionable whether defendant  
18      did anything relating to its advertising campaign that  
19      amounted to unlawful conduct, although the Court notes  
20      allegations relating to defendant's labeling might  
21      have presented a more colorful issue. But even there,  
22      issues were raised as to preemption and FDA labeling  
23      requirements. Moreover, even if any unlawful conduct  
24      could be shown, plaintiffs still had to prove  
25      defendant's conduct caused plaintiffs to purchase the

1 product and that plaintiffs suffered an ascertainable  
2 loss in so doing.

3 Both issues presented obstacles. Considering  
4 the basic consumer understanding that Nutella is  
5 essentially a hazelnut chocolate spread, even many of  
6 the objectors note they never bought the product based  
7 on health claims. One must wonder how plaintiffs  
8 would have established liability. Further, to show an  
9 ascertainable loss, plaintiffs would likely have to  
10 point to a comparable product of which there were few,  
11 if any, at the time, and take into consideration the  
12 benefit that plaintiffs nevertheless received from  
13 buying Nutella.

14 In addition, factoring into the Court's  
15 determination is both class counsel and Ferrero's  
16 representation, with which this Court agrees, that the  
17 expected recovery to the class is well within the  
18 range of reasonableness in light of the best possible  
19 recovery, possible setoffs, and attendant risks of  
20 litigation.

21 Accordingly, given the real and extensive  
22 risks involved in this case for plaintiffs, these two  
23 factors weigh heavily in favor of the approval of the  
24 settlement. See, for example, In re Suprema  
25 Specialties. "Approving settlement where plaintiffs



1 would have difficulty establishing liability and  
2 damages." In re Genta Securities Litigation.

3 Next, turning to the risks of maintaining the  
4 class action through trial.

5 The Third Circuit has explained that this  
6 factor tends to be neutral because "under Federal Rule  
7 of Civil Procedure 23(a), a district court may  
8 decertify or modify a class at any time during the  
9 litigation if it proves to be unmanageable," and  
10 proceeding to trial would always entail the risk even  
11 if slight of decertification. In re Cendant at 239.

12 Accordingly, the Court finds this factor is  
13 neutral or slightly weighs in favor of the settlement.

14 Turning to the defendant's ability to  
15 withstand a greater judgment.

16 This fact addresses whether defendants "could  
17 withstand a judgment for an amount significantly  
18 greater than the proposed settlement. In re Cendant  
19 at 240.

20 In this case, there is no real dispute that  
21 Ferrero has the ability to withstand a greater  
22 judgment. However, this factor is generally neutral;  
23 whereas, here the defendant's ability to pay greatly  
24 exceeds the potential liability and was not a factor  
25 in settlement negotiations.

1           In addition, even if a defendant could  
2       withstand a greater judgment than the amount of the  
3       settlement, this finding alone is insufficient to  
4       reject the term of a settlement. Cendant at 240.

5           Accordingly, the Court finds that this factor  
6       stands neutral.

7           Turning to the range of reasonableness of the  
8       settlement.

9           The last two factors evaluate whether the  
10      settlement represents a fair and good value for a weak  
11      case or a poor value for a strong case. In re  
12      Warfarin at 558.

13          "In conducting this evaluation it is  
14      recognized 'settlement represents a compromise in  
15      which the highest hopes for recovery are yielded in  
16      exchange for certainty and resolution, and courts  
17      should guard against demanding too large a settlement  
18      based on the court's views of merits of the  
19      litigation." In re Safety Components and In re AT&T  
20      Corporate Securities Litigation at 170. In that case,  
21      the Court found that settlement was an "excellent"  
22      result in light of the risk of establishing liability  
23      and damages despite the fact settlement possibly  
24      represented only 4 percent of the total damages claim.

25          The Court is satisfied that in light of the

1 fact that plaintiffs have a real risk of proving their  
2 claims, these two factors weigh strongly in favor of  
3 approving settlement for the reasons I've already  
4 described. In particular, even if liability were  
5 established and damages were provable, such damages  
6 would likely represent a small fraction of the  
7 purchase price.

8 A plaintiff must plead ascertainable loss  
9 "with enough specificity as to give the defendant  
10 notice of possible damages." Torres-Hernandez v. CVT  
11 Prepaid Solutions (D.N.J. 2008).

12 As one court in this district recently  
13 explained, "What New Jersey courts require for loss to  
14 be 'ascertainable' is for the consumer to quantify the  
15 difference in value between the promised product and  
16 the actual product received." Your case, Mr. Levy,  
17 Smajlaj v. Campbell Soup, 782 F.Supp. 2d 84 at 99  
18 (D.N.J. 2011).

19 No one disputes that there is value in the  
20 Nutella product, perhaps significant value, and that  
21 the original price of Nutella was on the order of  
22 several dollars. The parties predict that after fees  
23 and costs, claimants will likely receive approximately  
24 \$1.35 per jar up to five jars. If anything, this is  
25 at the high end of the expected recovery. The measure

1 of recovery for plaintiffs and for the class, if any,  
2 would be only a portion of the price paid for a jar.  
3 This amount, therefore, is well in line with that  
4 outcome. Therefore, these factors weigh strongly in  
5 favor of proving of the settlement.

6 Having weighed all the factors, the Court  
7 finds the class settlement is fair, reasonable, and  
8 adequate pursuant to Rule 23(e).

9 I will turn to adequacy of notice.

10 A number of objectors have complained about  
11 the adequacy of the notice. The reasonableness of the  
12 notice is governed by Rule 23(h). Like so many  
13 aspects of the class action, the touchstone of the  
14 question is "reasonableness." In particular, Rule  
15 23(h) requires "that notice of the motion of class  
16 counsel for attorneys' fees and non-taxable costs must  
17 be directed to class members in a reasonable manner."  
18 The rule does not necessarily require such motion to  
19 be served on class members but, rather, that it be  
20 directed to them in a reasonable manner.

21 As I stated, the Court appointed Rust as class  
22 administrator. Rust published notices in the same  
23 publications in which defendant had advertised  
24 Nutella. It published internet banners on popular  
25 websites, and set up a settlement website that

1 provided important documents for the class,  
2 information on how to file a claim or other options  
3 available for a class member, such as objecting or  
4 opting out of the class, providing answers to  
5 frequently asked questions, and contact information  
6 for additional questions. The website received over  
7 1 million hits, and the contact number received over  
8 1500 calls. Over 200,000 claims were filed for nearly  
9 1 million jars of Nutella. In addition, the cases  
10 received extensive media attention.

11 Based on this, I find that the method of  
12 notice was reasonable and comports with the  
13 requirements of Rule 23(h). See In Re: Ravisent  
14 Technologies, Inc.: Securities Litigation, approving  
15 of notice similar to that provided here over  
16 objections.

17 Some objectors complained that not enough  
18 information was provided detailing the hours class  
19 counsel devoted to the case and the fees they  
20 incurred. While the Court agrees that there was a  
21 paucity of information regarding counsel fees, which I  
22 will discuss in a bit, that does not affect whether  
23 the notice was reasonable. Although perhaps presented  
24 in a cursory fashion, counsel did post the same  
25 declarations regarding their fees on the settlement

1 website that were provided to this Court. McDonough  
2 v. Toys-R-Us, Inc., 2011 U.S. Dist. Lexis 150851 (E.D.  
3 Penn. December 20, 2011), finding that a failure to  
4 post any information regarding class counsel's fees  
5 was unfortunate but not fatal. Notice is not required  
6 to be perfect, only adequate. Rule 23(a) does not  
7 require that a notice contain every specific detail  
8 related to the settlement. In re Brokerage Antitrust  
9 Litigation (D.N.J. March 30, 2012).

10 The notice here was reasonable and adequate  
11 based on the present circumstances.

12 I'm going to turn to attorneys' fees and  
13 expenses.

14 All the named plaintiffs' attorneys including  
15 class counsel join in the request for an award of  
16 attorneys' fees and reimbursement of expenses incurred  
17 in this litigation. The award of attorneys' fees  
18 concerns two separate aspects.

19 First, plaintiffs' counsel are requesting 30  
20 percent of the gross amount of the monetary settlement  
21 plus reasonably incurred expenses of \$78,888 to be  
22 paid out of the 2.5-million-dollar award to the class.

23 Second, based on the injunctive relief  
24 obtained, which plaintiffs described as significant,  
25 plaintiffs are requesting an additional award of

1     \$3 million. I will address these separately because  
2     each aspect is valued differently, although objectors  
3     stress that in combination class counsel are seeking  
4     68 percent of the total recovery paid by defendant.

5             The Court understands plaintiffs' argument,  
6     that it is only seeking about 30 percent because of  
7     the way it values the injunction, and that its fees  
8     should be based on that putative value combined with  
9     the \$2.5 million monetary settlement. Objectors point  
10    out, however, that out of all money defendant is being  
11    asked to pay under the settlement, and that is the  
12    number, the \$5.5 million, they argue which would  
13    include the \$3 million fee requested, class counsel  
14    are seeking over \$3.8 million of it, or 68 percent.

15            The Court must analyze the attorney's fee  
16    provision under Rule 23(e) in much the same fashion as  
17    the settlement itself. "Attorneys' fees provisions  
18    included in proposed class action settlement  
19    agreements are, like every other aspect of such  
20    agreements, subject to the determination whether the  
21    settlement is 'fundamentally fair, adequate, and  
22    reasonable.'"

23            The district court has the discretion to amend  
24    or modify the award of attorneys' fees. "The amount  
25    of the award of attorneys' fees and expenses is

1 controlled by the Court and is within its sound  
2 discretion." In re Computron Software (D.N.J. 1998),  
3 citing In re GMC Pick-Up Truck Litigation, out of the  
4 Third Circuit. "A district court is not bound to the  
5 agreement of the parties to the amount of attorneys'  
6 fees."

7 Attorneys' fees are typically assessed through  
8 the percentage-of-recovery method or through the  
9 lodestar method. The percentage-of-recovery method  
10 applies a certain percentage of the settlement fund.  
11 See Welch & Forbes, Inc. V. Cendant (3d. 2001).

12 The lodestar method multiplies the number of  
13 hours class counsel worked on a case by a reasonable  
14 hourly billing rate for such services. In re AT&T at  
15 164. In common fund cases, such as this one, the  
16 percentage-of-recovery method is generally favored  
17 because "it allows courts to award fees from the fund  
18 'in a manner that rewards counsel for success and  
19 penalizes it for failure.'" In re Corporate  
20 Securities Litigation (3d Cir. 2005), quoting In re  
21 Lucent Technologies.

22 However, the Third Circuit has recommended  
23 that district courts use the lodestar method to  
24 cross-check the reasonableness of a percentage-of-  
25 recovery fee award. The cross-check is performed by



1 dividing the proposed fee award by the lodestar  
2 calculation resulting in a lodestar multiplier. When  
3 the multiplier is too great, the Court should  
4 reconsider its calculation under the percentage-of-  
5 recovery method with an eye toward reducing the award.  
6 The lodestar cross-check, while useful, should not  
7 displace a district court's primary reliance on the  
8 percentage-of-recovery method. In re AT&T at 164.

9 When analyzing a fee award in a common fund  
10 case, the Court considers several factors, many of  
11 which are similar to the Girsh factors, as I  
12 previously described. See Rite Aid at Note 9. These  
13 include:

14 One, the size of the fund created and the  
15 number of persons benefitted;

16 Two, the presence or absence of substantial  
17 objections by members of the class to the settlement  
18 terms and/or fees requested by counsel;

19 Three, the skill and efficiency of the  
20 attorneys involved;

21 Four, the complexity and duration of the  
22 litigation;

23 Five, the risk of non-payment;

24 Six, the amount of time devoted to the case by  
25 plaintiffs' counsel; and

1 Seventh, the awards in similar cases.

2 The list is not exhaustive.

3 In Prudential, the Third Circuit noted three  
4 other factors that may be relevant and important to  
5 consider:

6 One, the value of benefits accruing to class  
7 members attributable to the efforts of class counsel  
8 as opposed to the efforts of other groups, such as  
9 government agencies conducting investigations;

10 Two, the percentage fee that would have been  
11 negotiated had the case been subject to a private  
12 contingent fee agreement at the time that counsel was  
13 retained; and

14 Three, any innovative terms of settlement.

15 The fee award reasonableness factors "need not  
16 be applied in a formulaic way" because each case is  
17 different, "and in certain cases one factor may  
18 outweigh the rest." Rite Aid at 301.

19 The Court may give some of these factors less  
20 weight in evaluating a fee award. Moreover, the  
21 analysis of the Gunter factors overlaps with the Girsh  
22 factors used to assess the appropriateness of the  
23 settlement. In that regard, I will refer to my  
24 earlier findings when reviewing this fee application.

25 Let me turn to the lodestar analysis being

1     used as a cross-check.

2             I will address counsel's submissions regarding  
3     the time spent and fees spent. These submissions have  
4     been provided to aid the Court in performing a  
5     lodestar calculation that is used as a cross-check to  
6     confirm the reasonableness of the fee request.

7             At the outset I note that the parties have  
8     been litigating this matter for less than a year, and  
9     while some discovery has taken place, it does not  
10    appear to have been especially extensive. Two  
11    depositions were taken. Several third-party subpoenas  
12    were issued. Some written discovery was propounded.  
13    Experts were hired. Documents were collected and  
14    reviewed. Plaintiffs note that 53,000 pages of  
15    documents were produced. At first blush, this number  
16    might sound significant. But I must note that in the  
17    modern age of electronic discovery, civil class action  
18    cases can involve millions of documents, let alone  
19    pages.

20            A significant amount of counsel's time was  
21    also spent fighting with the proposed intervenors  
22    about which venue was most convenient or most  
23    appropriate.

24            In addition, the parties participated in an  
25    involved mediation process which resulted in this

1 settlement. Plaintiff's counsel submits these tasks  
2 have involved nearly 3,000 hours at a cost of over  
3 \$1.8 million in fees and costs.

4 Five firms have submitted declarations  
5 regarding the hours they have spent on this matter  
6 representing plaintiffs, their billing rates, and some  
7 brief explanation of their experience. Based on the  
8 declarations attached to plaintiffs' motion for  
9 attorneys' fees, plaintiffs' counsel have spent 2,982  
10 hours and purportedly generated \$1,796,402.75 in fees  
11 and \$78,888 in costs.

12 Let me just stop for one moment on the costs  
13 because there was also some reference there might be  
14 additional costs incurred during this process.

15 MR. CECCHI: I think, given your Honor's  
16 ruling as to those costs, we would not seek  
17 reimbursement of those costs.

18 THE COURT: Because I assumed that was with  
19 regard to the Johnson matter.

20 MR. CECCHI: Correct, your Honor.

21 THE COURT: And I was going to tell you that  
22 you would not be permitted to do so.

23 Unfortunately, there is no detail provided  
24 with these submissions. Rather, counsel has submitted  
25 spreadsheets showing total hours spent multiplied by

1 individual attorney rates. The Carella firm's  
2 submissions at least divide hours spent based upon the  
3 type of litigation or representation, such as  
4 pleadings, motion practice, discovery, et cetera, but  
5 that is as much detail as is afforded to the Court.  
6 None of the other firms have gone that far.

7 I have no means by which to gauge if the time  
8 was reasonable, if the time was spent working on  
9 successful billable matters, whether the time was  
10 duplicative of other counsel's work, nor am I  
11 convinced that the charged rates are all necessarily  
12 reasonable.

13 I've already had this during my argument with  
14 counsel. I noted the declaration of Mr. Davis that  
15 said he and his partner, Dan Taliaferro, are attorneys  
16 in Alabama and charged \$700 per hour, which he claims  
17 to be well within the market rate. I had questioned  
18 whether that was truly the market rate in Alabama.  
19 Mr. Davis noted in court today, because he has  
20 provided no information that would corroborate that  
21 statement about the Alabama area, but he said that  
22 essentially it is what he charges in similar types of  
23 contingent fee cases, but there would be a lesser  
24 amount if it were at a different hourly rate.

25 I also questioned the hours. Mr. Davis said

1 he and his partner spent 700 hours to "zealously  
2 assist" in this matter by "investigating, research,  
3 drafting pleadings, editing pleadings, discovery,  
4 taking depositions, management of office staff." His  
5 declaration at paragraph 5.

6 While Mr. Davis assisted in filing the Glover  
7 complaint and perhaps assisted in some motion  
8 practice, I note that his firm was not appointed as  
9 class counsel; and if, indeed, Mr. Davis spent nearly  
10 700 hours on this matter doing all the activities he  
11 suggests, I'm not sure how much was left over for the  
12 other attorneys to do. Yet, Scott & Scott, with whom  
13 Mr. Davis worked, says it spent nearly 1,780 hours on  
14 many of the same tasks, and that's the Mr. Guglielmo  
15 declaration.

16 It would appear to this Court that a  
17 significant number of hours are potentially  
18 duplicative. But based on the paucity of information  
19 provided, I cannot determine the reasonableness of  
20 these accrued fees with any sense of accuracy. This  
21 is not to say counsel are required to provide the  
22 Court full details of every 10th of an hour spent on a  
23 case, but here, where there are five firms and each is  
24 claiming a significant amount of time has been spent  
25 on a relatively straightforward matter that was

1 settled in less than one year after commencing the  
2 case and before defendant had answered or had its  
3 motion to dismiss ruled on, or even before a  
4 consolidated amended class action complaint had been  
5 filed, significantly more information would need to be  
6 provided before the Court can say with any certainty  
7 that the lodestar calculation is reasonable.

8 Based on that, I do not find counsel's  
9 submissions helpful in calculating a lodestar amount  
10 other than to set the ceiling on the fees that the  
11 attorneys accumulated.

12 Now I turn to the first aspect of the  
13 attorney's fee request, which is the reasonableness of  
14 the request for 30 percent of the \$2.5 million  
15 monetary settlement.

16 Although there is no general rule, the Third  
17 Circuit has observed that fee awards in common fund  
18 cases range from 19 percent to 45 percent of the  
19 settlement fund. Generally, a third is on the high  
20 end of what counsel is able to recover, and some  
21 courts have found that a reasonable fee award is  
22 generally to be around 25 percent of the fund.

23 Without even considering what plaintiffs are  
24 asking for, based on the injunctive relief, a 30  
25 percent recovery by itself is significant. Class

1 counsel are both firms of national reputation and, by all  
2 measures, did an excellent job in representing their  
3 clients and received a fair and reasonable settlement,  
4 and perhaps even generous settlement, considering the  
5 risks and merits or lack thereof of the case. That  
6 does not, however, justify the high percentage award  
7 in this case for the reasons I've already discussed.

8 This was not a complex case. The case took  
9 less than a year from when it was filed to when it was  
10 settled. Only a small measure of discovery was  
11 performed relative to other large-scale civil  
12 litigation class actions. Much of the time was spent  
13 between class counsel in this matter and counsel in  
14 the California action squabbling about where the case  
15 should be brought. The case never proceeded beyond  
16 the early stages of litigation.

17 While defendant's motion for dismissal under  
18 Rule 12(b)(6) was fully briefed, it was terminated  
19 after the case was consolidated, and class counsel was  
20 given leave to file a consolidated complaint, which  
21 was never done because of settlement tasks. Against  
22 this backdrop, I will analyze the factors.

23 Starting with the size of the fund created and  
24 the number of persons benefitted.

25 As the Court has already noted, claims for



1 over 900,000 jars of Nutella were filed at the end of  
2 June, and the class was set to close on July 5, 2012.  
3 Counsel seeks to recover 30 percent of the gross fund  
4 in fees in addition to \$78,888 in costs leaving, a  
5 remaining balance of \$1,587,000.

6 Claims for nearly a million jars had been  
7 filed within a week remaining before the claim period  
8 closed.

9 The parties initially agreed the class should  
10 receive up to \$4 per jar; yet, after counsel's fees  
11 and costs, it would leave the class approximately  
12 41.60 per jar. Plaintiffs theorize that after all  
13 claims are filed and additional costs and interest are  
14 taken, the class will receive approximately \$1.30 per  
15 jar. While this might represent a fair payout for the  
16 class, based upon the allegations and the chance of  
17 recovery, it is significantly less than what may have  
18 been anticipated or bargained for in the settlement.

19 Furthermore, the junction purportedly protects  
20 against future harms by addressing plaintiffs'  
21 allegations as to misleading marketing and labeling.  
22 In that sense, the number of people potentially  
23 benefitted is large. But as I will discuss in a few  
24 moments, the Court is suspect about the overall  
25 benefit of the injunctive relief, and it does not

1 directly redress any harm allegedly suffered by the  
2 class itself. Therefore, it does not affect the  
3 number of class members benefitted.

4 Thus, I find that this factor would support a  
5 reduction in the amount of fees.

6 Looking at the presence or absence of  
7 objections.

8 As I've already indicated, there are a number  
9 of objections. Plaintiffs asked the Court for  
10 additional pages in its briefing because of the extent  
11 of the objections. Both parties note that many of the  
12 objections are directed not at the monetary settlement  
13 itself but at the amount of fees the attorneys are  
14 seeking. Those same objections will be discussed by  
15 this Court in a moment with regard to the injunctive  
16 relief.

17 In this regard, the presence of some  
18 meaningful objections is probative in determining the  
19 appropriate fee. See Rite Aid and In re AT&T.

20 Turning to the skill of class counsel.

21 To measure the quality of counsel, courts must  
22 examine the result achieved, the difficulties faced,  
23 and the speed and efficiency of the recovery, the  
24 experience and expertise of counsel, and the  
25 performance and quality of opposing counsel. Milliron

1     v. AT&T (D.N.J. 2009).

2             In this case class counsel negotiated a  
3     valuable settlement within a reasonable amount of time  
4     since the start of the litigation. Because of their  
5     timely efforts, the class will benefit more. Had this  
6     case proceeded further, it would result in a greater  
7     expenditure of fees and costs and perhaps an eventual  
8     dismissal.

9             The Court finds that this factor weighs in  
10    favor of approving a significant award of attorneys'  
11    fees but not necessarily the amount that class counsel  
12    seeks.

13            Turning to complexity and duration and  
14    duration of litigation.

15            I analyzed that with the Girsh factors. The  
16    claims against Ferrero were not complex. Without  
17    reciting of the Court's previous findings on this  
18    issue, the Court, nonetheless, finds that by  
19    successfully negotiating a settlement and with  
20    excellent counsel representing Ferrero, the class  
21    counsel provided the class with a benefit at this  
22    juncture. But because of the circumstances already  
23    discussed, such as the early stage at which the  
24    litigation was settled, the relatively small amount of  
25    substantive work required of and performed by counsel,

1 this factor weighs in favor of approving a reduced  
2 amount of attorneys' fees.

3 Turning to the risk of nonpayment.

4 With regard to non-payment, there is no  
5 dispute that Ferrero is in good financial standing and  
6 could withstand a sizeable judgment. Thus, that  
7 factor is neutral.

8 Turning to the amount of time devoted to the  
9 litigation.

10 Class counsel say that they have devoted  
11 significant time to this litigation, nearly 3,000  
12 hours. As I have already commented, the Court  
13 questions how so many hours could have been spent by  
14 so many firms on a case that was not yet a year old  
15 when it settled and had yet to proceed past the  
16 nascent stages of litigation. Still, counsel  
17 undoubtedly spent a significant amount of time  
18 litigating and did so on a contingency basis, and  
19 without any guarantee of success or award, yet managed  
20 to negotiate a very favorable settlement that will  
21 benefit the class members.

22 The Court concludes that these efforts,  
23 although, I think, overstated by counsel, weigh in  
24 favor of a reduced but significant fee award.

25 Turning to awards in similar cases.

1           The comparison of the fees sought by class  
2   counsel with fees awarded in recent class actions  
3   militates in favor of reducing the requested 30  
4   percent fee. As I have discussed, courts have broad  
5   discretion in reviewing attorneys' fee awards, and the  
6   award of 30 percent is generally a sizeable award with  
7   25 percent being a more typical result in a case such  
8   as this. Because of the factors and analysis I have  
9   already undergone, the Court finds that the percentage  
10   of the fund attorneys' fees should be reduced from 30  
11   percent to 25 percent.

12           Based on the posture of the case, the time  
13   when the case was filed to settlement, the relatively  
14   few substantive issues involved, the Court exercises  
15   its discretion and thus reduces the recovery from 30  
16   percent of the common fund of \$2.5 million of the  
17   gross amount to the 25 percent which yields a fee of  
18   \$625,000.

19           Turning next to how I should value the  
20   injunctive relief.

21           I find that it should be assessed based on the  
22   common benefit it confers on the members of the class.  
23   "The key consideration in determining a fee award is  
24   reasonableness in light of the benefit actually  
25   conferred." The Court must be cautious in awarding

1 value to an injunction. "Precisely because the value  
2 of injunctive relief is difficult to quantify, its  
3 value is also easily manipulable by overreaching  
4 lawyers seeking to increase the value assigned to a  
5 common fund." McCoy v. Health Net, Inc. (D.N.J.  
6 2008).

7 In McCoy, the court approved counsel's  
8 valuation finding that the injunction imposed a "14.5  
9 percent increase to the allowable amount paid by  
10 defendant health insurance company which bestowed a  
11 sizeable financial benefit." But courts have reduced  
12 or denied approved attorneys' fees where there is a  
13 minimal benefit to the class because of the injunction  
14 or it has dubious value.

15 In Schwartz v. Dallas Cowboys Football Club  
16 out of the Eastern District of Pennsylvania, the  
17 district court found that the valuation of the  
18 injunctive relief was too high and the value conferred  
19 was too low to either approve the settlement or the  
20 high amount of attorneys' fees sought by plaintiff's  
21 counsel.

22 In In re HP Inkjet, the settlement agreement  
23 was valued at \$1.5 million, combining the value of  
24 nontransferable credits and the injunctive relief.  
25 That was out of the Northern District of California, a

1 2011 case. Counsel sought approximately \$2.3 million  
2 along with \$600,000 in costs. The Court reasoned that  
3 "the extent to which an attorney's fee award exceeds  
4 the value of the settlement to the class is  
5 problematic." The Court went on stating that "To  
6 allow the award of attorneys' fees to outstrip the  
7 benefit to consumers in such cases would undermine the  
8 importance of focusing the efforts of class action  
9 counsel on issues that most affect consumers." The  
10 Court granted a reduced fee award to class counsel in  
11 that case.

12 As I ruled before, I have struck the Johnson  
13 report offered by plaintiffs' counsel. Therefore,  
14 there is nothing in the record to support class  
15 counsel's valuation of the injunction. Nevertheless,  
16 plaintiffs' counsel argued that the injunction is  
17 worth a substantial amount because it forces defendant  
18 to spend millions on redesigning their label and  
19 advertising campaign. But that is not the way to  
20 measure the injunction.

21 As I said before, an injunction should be  
22 valued based on what value it provides to the class  
23 and not what cost it imposed on the defendant. The  
24 injunctive relief does not provide the class with as  
25 substantial a benefit as class counsel suggests. The

1 class is defined as individuals who have already  
2 purchased Nutella, allegedly have been harmed by it,  
3 and now know of any potential deception related to the  
4 nutritional value of Nutella. Therefore, relatively  
5 little value can be derived by the class based on  
6 defendant's future action.

7 Further, even if I were to consider the costs  
8 to defendant, they are likely much less than  
9 plaintiffs suggest. Certainly, defendant must incur  
10 costs in creating new labels, halting its ad campaign,  
11 and creating new marketing. But the changes to the  
12 Nutella's marketing are generally minor, and the  
13 injunctive relief does not require defendant to  
14 replace products already on store shelves.

15 Therefore, there are no replacement costs to  
16 factor in. Defendant would still need to place labels  
17 on future Nutella products with or without the  
18 injunction, and several of the objectors have raised  
19 this point as well.

20 Additionally, while it will cost defendant to  
21 rework their advertising campaign, there is nothing to  
22 suggest this would not have happened without the  
23 injunction. Defendant has experienced successful  
24 product growth based on advertising, and it is very  
25 likely that defendant would have intended to continue



1 advertising. But companies continually revamp their  
2 advertising, particularly television commercials, and  
3 there is nothing to suggest that defendant would not  
4 have incurred this cost or a similar cost but for the  
5 injunction.

6 This, however, does not mean that there is no  
7 value to the injunction, only that I find it has been  
8 significantly overvalued by class counsel. A number  
9 of the objectors argue that even going forward, the  
10 injunction does very little because individuals have  
11 no more reason to be deceived now than they did  
12 previously.

13 For example, defendant agreed to put  
14 ingredient information, fat and sugar content,  
15 et cetera, on the front of the label even if such  
16 information is already on the back. Objectors say  
17 that if an individual were concerned about this  
18 information, then she would have known to check the  
19 label, and the injunction therefore provides little  
20 practical effect. But these arguments also go to the  
21 merits of the litigation itself and whether Nutella  
22 was actually marketed fraudulently or not.

23 Assuming the merits of the claims, defendant  
24 has agreed to change its label, although it does not  
25 have to replace products currently on the shelf. It

1 has agreed to stop airing potentially misleading  
2 advertisements, and to provide more information  
3 regarding the product's sugar and fat content. These  
4 address the primary concerns raised by plaintiffs in  
5 their complaints.

6 To the extent anyone was deceived by the  
7 earlier marketing, there is less chance that will  
8 occur in the future as a result of the injunction.

9 Some objectors also complain that class  
10 counsel will only have advisory input into the new  
11 advertising campaign. To some extent, this objection  
12 is moot as defendant and plaintiffs have agreed to the  
13 language to be used.

14 Also, the class received some benefit from the  
15 injunction because it goes to the harms alleged in  
16 plaintiffs' complaints. Plaintiffs not only sought  
17 monetary redress but also to prevent future harm and  
18 fraud. The injunction helps to achieve that goal even  
19 if the risk was slight to begin with. Therefore, the  
20 class receives some benefit although significantly  
21 less than what plaintiffs estimate.

22 Because I find that the injunction has some  
23 value, but that it is significantly below class  
24 counsel's assessment and not ascertainable based upon  
25 the submissions made, I will award a fee for the

1 injunctive relief but in an amount substantially less  
2 than what has been requested.

3           Considering class counsel's combined two fees,  
4 one based on the injunctive relief and the other from  
5 the common fund, convinces me further that a  
6 significant reduction in the counsel fees requested is  
7 appropriate. A recent case from the Ninth circuit is  
8 instructive although not binding. A number of  
9 objectors cite to this opinion. In In re Bluetooth  
10 the court vacated the district court's approval of a  
11 settlement agreement that awarded the class \$100,000  
12 but set aside about \$800,000 for class counsel.

13           The Court shared a concern that other courts  
14 have expressed, "warning that 'private agreements to  
15 structure artificially separate fee and settlement  
16 agreements' should not enable parties to circumvent  
17 the 25 percent benchmark requirement." That's from  
18 In re Bluetooth quoting In re General Motors Corp  
19 (3d Cir. 1995).

20           "Even when technically funded separate, the  
21 class recovery and the agreement on attorneys' fees  
22 should be viewed as a 'package deal.'" That decision  
23 focused on whether there was the appearance of  
24 collusion between the parties, which I do not find is  
25 an issue here, but the case is still instructive.

1           Class counsel is receiving a significant  
2           amount of fees but in an amount that more accurately  
3           reflects the work and time involved and the value of  
4           the injunction.

5           I am going to award for the injunctive relief  
6           a fee in the amount of \$500,000.

7           Finally, in recognition of their services to  
8           the class, each named plaintiff is entitled to a  
9           payment. \$2,000 has been requested for each of those  
10          named plaintiffs under of the terms of the settlement.  
11          Courts routinely approve awards to compensate named  
12          plaintiffs for the service they provide and risk  
13          incurred during the course of the litigation.

14          Plaintiffs request \$2,000, and I find the only  
15          one objecting to that was Mr. Andrews, but I do find  
16          it is reasonable. I will award the \$2,000.

17          I'm going to go through each of the objections  
18          separately even though they have been largely  
19          incorporated in my comments.

20          First addressing the Attorney General of  
21          Texas.

22          Assistant Attorney General Jim B. Cloudt has  
23          lodged an objection on behalf of the state of Texas  
24          through the Attorney General of Texas and based on the  
25          fact that the certified class includes Texas

1 residents. Mr. Cloudt does not oppose the monetary  
2 settlement itself but, rather, the efficacy of the  
3 proposed injunctive relief and the size of the  
4 injunctive fee award.

5 I have already dealt with those concerns in  
6 this opinion and, therefore, I think I do not need to  
7 make any further comment about it.

8 Mr. Greenberg raises a number of points in his  
9 objection. Sylvia Bader has joined in Mr. Greenberg's  
10 objection. Primarily, Mr. Greenberg objects on the  
11 grounds that the settlement unfairly overcompensates  
12 class counsel and perhaps to the detriment of the  
13 class. He argues, first, that the benefits in the  
14 injunction are illusory, and counsel cannot sustain  
15 its argument that should be valued at 3 million. He  
16 does not argue, unlike the other objectors, that the  
17 monetary settlement did not achieve enough for the  
18 class. He is willing to forego any recovery for his  
19 purchase and asserts he objects only on the principle  
20 that class counsel should not receive the lion's share  
21 of the recovery.

22 I had, to some extent, already agreed with  
23 that and reduced both a percentage of the recovery  
24 from the monetary settlement as well as significantly  
25 reduced the injunctive fee award. I do not agree with

1 Mr. Greenberg that there is no benefit to the class  
2 based on the injunction, as I've already indicated.

3 Amy Ades lodged an objection through her  
4 counsel. She is a named plaintiff in another consumer  
5 fraud action against Nutella out of the Southern  
6 District of New York. Mr. Levy appeared here today on  
7 her behalf. She objects: The settlement is  
8 inadequate, the notice was defective, the fee requests  
9 are excessive. And, frankly, it's only as to the last  
10 point that I have had some agreement. The settlement  
11 is fair, reasonable, and adequate.

12 As I have explained, plaintiffs did not have  
13 an easy case, and Ms. Ades would have likely faced  
14 many of the same difficulties as her New York action.  
15 It is not clear if plaintiffs could establish any of  
16 the elements of the consumer fraud claim or their  
17 related breach of warranty claims. And if they had,  
18 they would have only been able to recover a portion of  
19 the purchase price. This is what Ms. Ades would be  
20 allowed to recover under the settlement. She was, of  
21 course, free to exclude herself from the class.

22 And I also find, as I've already stated, that  
23 notice was adequate, and I will not repeat my findings  
24 there.

25 Robert Falkner and Christine Streeter, through

1 their counsel, have lodged an objection. They object  
2 to the extent of the attorneys' fees and believe more  
3 should have been given to the class, and, in  
4 particular, object to the extent of the injunctive fee  
5 award. I have already made my findings in that regard  
6 and incorporated them into my findings here as well as  
7 the arguments being made with regard to combining the  
8 injunctive fee with the monitor settlement award.

9 Also, there was an objection with regard to  
10 the cy-près provision, which is moot.

11 The Sibley objectors -- Katie Sibley, Daniel  
12 Sibley, Gary Sibley, Sherri Johnson, Janis Johnson,  
13 and Jenny Iriarte -- are from Texas, and they have  
14 filed very similar or really identical papers;  
15 collectively, the Sibley objectors. Gary Sibley is an  
16 attorney at the Sibley firm and filed a more formal  
17 objection. These objections are being discussed as a  
18 group as they appear to be related both in form and in  
19 addition to some of the objectors appearing to be  
20 familially related.

21 First, the objectors complained about the  
22 cy-près provision. That is moot.

23 Next, they complained about the size of the  
24 monetary settlement fund and the amount of attorneys'  
25 fees. I've already dealt with those concerns as well

1 as what could have been recovered here both based on  
2 the risks of liability and damages, and that only a  
3 portion of the amount paid for Nutella could have been  
4 recovered, and that is what has been achieved.

5 Chris Hampe objects to the settlement because  
6 he believes the common fund attorneys' fees in  
7 combination with the injunctive fee award is grossly  
8 excessive. I've already dealt with that.

9 The Bochenek objectors -- Agatha Bochenek,  
10 Brandon Goodman, and Edward Hagele -- have lodged an  
11 objection through counsel. At the outset, I note that  
12 when we entered court, none of them attested to being  
13 part of the class. A representation was made here  
14 today by Mr. Langone that they now have declarations  
15 stating that they are. They would have had no  
16 standing or basis to object.

17 They complained about the information provided  
18 regarding the fee request or time records. As I have  
19 noted, class counsel has provided submissions with  
20 little detail; and while I had concerns about that,  
21 that really goes to the lodestar which is a potential  
22 cross-check against reasonableness and did not have a  
23 bearing on my final analysis.

24 They also complained about collusion between  
25 the parties. This settlement, as have I stated now



1 numerous times, was reached during a mediation before  
2 former District Judge Politan, and there is no reason  
3 to believe that any collusion occurred under the  
4 careful scrutiny of that well-respected jurist.

5 They also complained of the notice of the  
6 settlement and the fee request. I've dealt with these  
7 as well. I think there is also as well, then, nothing  
8 new in their objections that need to be separately  
9 addressed.

10 Let me address Chris Andrews, who is not here.  
11 Chris Andrews filed a 100-page objection. The Court  
12 finds Mr. Andrews, no surprise to anyone, appears to  
13 be a professional objector who has extorted additional  
14 fees from counsel in other cases through his  
15 objections or threats to object, and has as well based  
16 upon a submission made to this Court done so in this  
17 case.

18 In his objections he states that he has spent  
19 140 hours investigating this case and expects to be  
20 paid more than \$25,000 because class counsel failed to  
21 perform their job. On page 84 of his objection, he  
22 states: "If I don't get paid, I will appeal and make  
23 new case law or have a new law written."

24 Mr. Andrews is certainly within his rights to  
25 pursue an appeal if he is not satisfied with the

1 results. He had an opportunity to opt out and pursue  
2 his own litigation, but he is not entitled to extort  
3 money. I reviewed his entire objection and find it  
4 wanting. Large parts of his brief are plagiarized  
5 from those of other objectors, such as Mr. Greenberg,  
6 or appeared to be copied from websites. The points he  
7 does make are better made by other objectors, are  
8 concerns the Court had without the benefit of  
9 Mr. Andrews' briefing, or are entirely without merit.  
10 Much of his objection involves trying to determine  
11 Nutella's full sales figures from online research and  
12 sifting through court documents.

13 Mr. Andrews believes he or the class is  
14 entitled to a significant share of defendant's  
15 revenues.

16 He also wants a 10 percent finder's fee for  
17 any increase in the class fund. There is no legal  
18 basis for the argument about receiving a share of the  
19 defendant's revenue.

20 Recovery, if any, would have only been a  
21 portion of the price paid for the Nutella. He stated  
22 he bought one 26-ounce jar of Nutella. The settlement  
23 will allow him to recover a portion of the purchase  
24 price which is precisely what he would have recovered  
25 had he brought his case individually.

1 He is not entitled to the defendant's profit.

2 All his arguments are without merit.

3 That concludes my findings.

4 I'll need an order.

5 MR. CECCHI: We will provide an order, your  
6 Honor.

7 I just wanted to note, particularly on that  
8 last point, although Mr. Andrews did not come today,  
9 we received additional emails, which I would like to  
10 make part of the record in the event that Mr. Andrews  
11 brings the matter up to our brother on the Third  
12 Circuit. We got some this morning.

13 THE COURT: Because I had one last week that  
14 came to you that was provided to me.

15 MR. CECCHI: Correct. We got one this morning  
16 that was of the same tenor. So I would like to make  
17 that part of the record.

18 The other thing I would like to say is, first,  
19 I think on behalf of plaintiffs' counsel, and, I know,  
20 defendant's counsel, we appreciate the effort your  
21 Honor put into this matter. There were a lot of  
22 procedural motions and other filings that your Honor  
23 had to deal with -- this was not today's hearing --  
24 deal with, all these objections. I know it's not  
25 easy, and we wanted to thank your Honor for the effort

1     you put in.

2             I also wanted to note that although in some  
3     aspects we had a different view, it was an excellent  
4     opinion, and I'm going to get the transcript and use  
5     it in the future on some of the issues your Honor  
6     addressed, and so we thank you for your effort.

7             THE COURT: Let me say, and I said it  
8     throughout the opinion, because this is my last  
9     opportunity to speak on this and because we do have  
10    counsel for some of the objectors present here, as  
11    well as one of the objectors himself, that this really  
12    was an excellent result understanding what this case  
13    was about. Let there be no mistake about it. Perhaps  
14    I'll just leave it at that.

15            MR. CECCHI: We appreciate that, your Honor,  
16    because we felt the same way.

17            Thank you.

18            MR. EGGLETON: Thank you very much, your  
19    Honor.

20            THE CLERK: All rise.

21            (Proceedings concluded.)

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C E R T I F I C A T I O N

PURSUANT TO SECTION 753, TITLE 28, USC, THE  
FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE  
TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE  
ABOVE-ENTITLED MATTER.

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VINCENT RUSSONIELLO, CCR  
OFFICIAL U.S. COURT REPORTER

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C E R T I F I C A T E

I, **Vincent Russoniello**, Official United States Court Reporter and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.

S/Vincent Russoniello  
Vincent Russoniello, C.S.R.  
Certificate No. 675  
Date: July 17, 2012

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re Polyurethane Foam Antitrust  
Litigation

Case No. 1:10 MD 2196

ORDER GRANTING SANCTIONS

This document relates to:

ALL DIRECT PURCHASER CLASS  
ACTIONS

JUDGE JACK ZOUHARY

Pending before this Court is the Indirect Purchaser Class (“IPC”) Motion for Sanctions (Doc. 2107). Objector Andrews opposed (Doc. 2108) and IPC replied (Doc. 2110). Objector Andrews also filed an unauthorized sur-reply, characterized as a supplemental response (Doc. 2111).

While IPC’s Motion was pending, the Sixth Circuit denied Andrews’ petition for rehearing *en banc* (Doc. 2110-1, Ex. A). Andrews filed a Request to Stay the Mandate (Doc. 2109) with the Sixth Circuit, noting he planned to file a petition for writ of certiorari with the United States Supreme Court. The Sixth Circuit previously advised Andrews in its June 2016 Order dismissing his appeal that no mandate would issue (Doc. 2110-4, Ex. D). It confirmed this fact in an October 2016 letter (attached) responding to Andrews’ stay request. This means there are no more avenues for Andrews to delay this litigation on appeal, and this Court now turns to the Motion at hand.

Andrews failed to post an appeal bond as previously ordered by this Court (Doc. 2068), resulting in dismissal of his appeal by the Sixth Circuit (Doc. 2100). In so doing, the Sixth Circuit noted (*id.* at 3):

Professional objectors, such as Andrews, may not disrupt the settlement process based on nothing more than unsupported suppositions. . . . [His] objections to the settlements lack merit, his appeal has the practical effect of prejudicing the IPC by delaying the disbursement of settlement funds, and he offers no proof of financial hardship that would justice his failure to post the bond.

This Court's authority to sanction Andrews is found in 28 U.S.C. § 1927, which reads as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

*See also Gitler v. Ohio*, 632 F. Supp. 2d 722, 727 (N.D. Ohio 2009) ("Although § 1927 on its face limits who may be sanctioned to an attorney or other person allowed to conduct cases, courts in the Sixth Circuit can sanction *pro se* litigants under that provision").

If there were any doubt whether to order a sanction, and there is none, one need look no further than Andrews' most recent and unauthorized "supplement" filing (Doc. 2111). Beyond the improper filing, the substance -- or lack thereof -- once again reflects Andrews' unreasonableness: claiming as he does, without factual or legal support, that IPC counsel, not he, deserves sanctions. Quite the opposite. Enough already with these repetitive, warmed-over, and meritless arguments.

This Court agrees with the IPC that Andrews continues his vexatious use of the judicial system and does so either to extort a pay-off from the IPC or as a delay tactic to prolong his coercion attempt. This Court further agrees that Andrews has delayed this case far too long and has ignored both this Court's Orders and rulings from the Sixth Circuit.

While this Court declines to impose the panoply of sanctions suggested by the IPC, this Court does find favor in the request that Andrews be penalized for the amount of interest that has been lost

to the IPC due to his frivolous filings. That amount, from April 2016 through October 2016, totals \$15,303, with interest continuing to run until payment is made in full.

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE

October 24, 2016



**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<hr/>	)	MDL Docket No. 2196
IN RE: POLYURETHANE FOAM ANTITRUST	)	
LITIGATION	)	Index No. 10-MD-2196 (JZ)
<hr/>	)	
THIS DOCUMENT RELATES TO:	)	Hon. Jack Zouhary
 INDIRECT PURCHASER CLASS	 )	
	)	
<hr/>	)	

**INDIRECT PURCHASER CLASS’ MOTION FOR SANCTIONS  
AND INCORPORATED MEMORANDUM OF LAW**

Indirect Purchaser Plaintiff Class (“IPP” or the “Class”) moves this Court for an order imposing sanctions on Objector Christopher Andrews (“Andrews”) pursuant to 28 U.S.C. §1927 as follows: (1) monetary sanctions against Andrews; and (2) to enjoin him from making any filings in this litigation without first obtaining Court approval, and in support of this motion state:

**INTRODUCTION**

As more fully discussed in Section I below, as a threshold matter this Court has jurisdiction to order sanctions against Andrews, even though his *en banc* petition is pending in the Sixth Circuit Court of Appeals. *Val–Land Farms, Inc., v. Third National Bank In Knoxville*, 937 F. 2d 1110, 1117 (6th Cir. 1991). Because Andrews’ repeated filings in this Court and in the Sixth Circuit have been found to be frivolous and without merit, this Court should impose sanctions on Andrews, pursuant to 28 U.S.C. §1927 for the undue delay and proliferation of this litigation and the damage he caused to the Class.

Notwithstanding this Court's approval of the parties' settlement of the case *nine months* ago, the Class has not been able to recover a single penny of their long-overdue \$151,250,000 settlement monies due to a single, frivolous objector. Andrews has single-handedly prevented finality of the Settlements via his myriad of baseless motions and appeals. Moreover, he has managed to hold the Class hostage while flagrantly violating orders of this Court and the Sixth Circuit Court of Appeals with impunity. While this case is currently pending before the Sixth Circuit on Andrews' latest frivolous petition for *en banc* review, ***this Court has jurisdiction to and should sanction Andrews now*** to put an end to his egregious conduct.

As this Court knows, more than six months ago the Court ordered that Andrews was required to post a \$145,463 appeal bond as a condition to Andrews' continuing to pursue his frivolous objections on appeal. In issuing the bond, this Court concluded that, as compared to the other handful of objectors that had engaged in vexatious conduct, "Andrews is the worst," finding that he had advanced "scurrilous, unfounded accusations" and "repeatedly made baseless accusations using inappropriate language" about Class counsel, this Court and the Sixth Circuit Court of Appeals. (Doc. # 2065) The Court further concluded that Andrews' arguments on appeal (which mirrored his frivolous objection advanced to this Court) were, "even under the most charitable view of the merits of Objectors' arguments," highly unlikely to succeed on appeal. *Id.* at 6-7; *see also id.* at 16 ("To now have Objectors file frivolous appeals in pursuit of a payoff is not simply a detriment to the settling parties—it is an insult to the judicial system.").

That bond order, and repeated subsequent orders mandating that Andrews post such bond, have simply been ignored by Andrews, as he has continued to press his frivolous objections on appeal without penalty or sanction. Instead, Andrews filed *six* separate *failed* motions or pleadings attacking the bond—three of which were filed in this Court and three in the

Sixth Circuit—all of which were based on groundless assertions that the Court had already expressly and repeatedly rejected. When the Sixth Circuit dismissed Andrews’ appeal for failure to post the bond, it found that “Andrews’ objections to the settlements lack merit, [and] his appeal has the practical effect of prejudicing the IPC by delaying the disbursement of settlement funds...” *IPC v. Andrews*, Case No. 16-3168, Doc. # 38-1 at 3 (6th Cir. June 20, 2016). Indeed, the Class has lost at least \$13,086.30 in interest from April 2016 through September 2016, due to the delayed disbursement of funds, in addition to the costs and additional attorneys’ fees (for which Class Counsel is not at this time including in this motion for sanctions) by having to respond to Andrews’ incessant, meritless filings. *See* Doc. # 2042-5 at 4. The Class will seek further sanctions against Andrews if he persists in causing further delay through his frivolous filings. The calculation of lost interest for months after September 2016 are set forth in [Doc. # 2042-5 at 4]. The Class will also seek attorneys’ fees for services in connection with Andrews’ conduct in continuing to prosecute his frivolous appeal.

In dismissing Andrews’ appeal, the Sixth Circuit allowed Andrews fourteen days from the date of that dismissal to post the required bond if he wanted to further pursue his appeal. Andrews did not do so, choosing instead, without posting a bond, to file a petition for *en banc* review with the Sixth Circuit, in which he continued to press the merits (or lack thereof) of his objections to the settlement. Andrews has essentially acknowledged that his pending *en banc* petition is meritless and unlikely to be granted as he has already threatened Class Counsel with a further certiorari appeal to the United States Supreme Court. [*See* Doc. # 2102 and Ex. A, Email from C. Andrews to M. Miller dated September 15, 2016]. And as Andrews has just recently made clear, he intends to follow through on the filing of an undeniably frivolous petition for a

writ of certiorari, and further delay the resolution of this litigation and payment of proceeds to the Class for many more months.

The Class cannot continue to suffer at the expense of this vexatious, extortionate litigant. The time is ripe for this Court to sanction Andrews monetarily, and also enjoin him from making any further court filings in the action without the Court’s prior approval.

**I. The Court Has The Authority And Jurisdiction To Impose Sanctions While the Case is Pending Appeal.**

As a threshold matter, this Court has jurisdiction to enter sanctions against Andrews, even though the case is currently pending on appeal and is subject to potential additional appeals. *See Val–Land Farms, Inc., v. Third National Bank In Knoxville*, 937 F. 2d 1110, 1117 (6th Cir. 1991) (“Our circuit has held that a district court retains jurisdiction to entertain a motion for...sanctions even after the filing of a notice of appeal”); *see also Reg’l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 156 (6th Cir. 1988) (“The district court retains jurisdiction to resolve a motion for attorneys fees or sanctions even while an appeal of the merits is pending in the court of appeals.”).

28 U.S.C. § 1927 provides that “any...person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” In particular, those who file “unfounded, unmerited, and unsuccessful motions for reconsideration simply because they disagree with a ruling, decision, or order should expect to be sanctioned to the full extent permitted under...28 U.S.C. § 1927.” *Miller v. Norfolk Southern Rwy. Co.* 208 F.Supp.2d 851, 854 (N.D. Ohio 2002); *see also Great Lakes Towing Co. v. Kornmeier*, 299 F.Supp.2d 793, 794-95 (N.D. Ohio 2014) (sanctioning counsel for filing a motion for reconsideration on the basis

that “the hour I spent in reviewing the motion, my former order, and writing this order is an hour wasted for no useful purpose, and an hour taken from the several other matters awaiting my attention”).

Accordingly, the Sixth Circuit and the Northern District of Ohio have imposed sanctions under §1927 on litigants that unreasonably multiplied case proceedings under circumstances far less egregious than those here. For instance, courts in this Circuit often award fees under §1927 for *single* instances of sanctionable conduct, as compared to the *half dozen* duplicative motions filed here on a bond issue that had already been repeatedly and expressly rejected in this case. *See, e.g. Nollner v. Southern Baptist Convention, Inc.*, 628 Fed.Appx. 944, 950-51 (6th Cir. 2015) (upholding sanctions of “reasonable attorneys’ fees” under Section 1927 on the basis that counsel “intentionally and needlessly caused additional expense to” party by filing an “untimely and unfounded motion”); *Liberty Legal Foundation v. National Democratic Party*, 575 Fed. Appx. 662 (6th Cir. 2014) (affirming order issuing sanctions where counsel brought a single suit that was promptly dismissed and “knew or reasonably should have known that the claims in the case had no basis in law” and “were without merit”); *Thurmond v. Wayne County Sheriff Dept.* 564 Fed. Appx. 823 (6th Cir. 2014) (affirming sanctions where counsel “unreasonably and vexatiously multiplied proceedings” by filing an “unviable and duplicate” complaint that caused the opposing party to “incur unnecessary expenses in defending against the new action by filing a motion to dismiss and a motion for sanctions, before [the] counsel finally stipulated to dismiss the complaint”); *Velocys, Inc. v. Catacel Corp.*, 2011 WL 4945291 (N.D. Ohio 2011) (imposing

sanctions for statements made by a party and his counsel, during a single hearing, “without any factual basis,” even though they were not “intentional misstatements”).<sup>1</sup>

In addition to monetary sanctions, §1927 authorizes a court to enjoin a vexatious litigant where he has wasted judicial resources. “Every paper filed with the Clerk of ... Court, no matter how repetitious or frivolous, requires some portion of the [Court’s] limited resources. A part of the Court’s responsibility is to see that these resources are allocated in a way that promotes the interests of justice.” *In re McDonald*, 489 U.S. 180, 184 (1989). “The goal of fairly dispensing justice ... is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests.” *In re Sindram*, 498 U.S. 177, 179–80 (1991). Where a litigant has engaged in such waste, the court may enjoin him from submitting motions or pleadings in a case by ordering the court’s clerk to not accept any such filings without the court’s express prior approval. *See Walker v. Heideman*, 229 F.3d 1155, \*1 (6th Cir. 2000)

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<sup>1</sup> *See also Coniglio v. CBC Services, Inc.* 2013 WL 3776179 (N.D. Ohio 2013) (imposing sanctions where counsel refused to name what they knew was a necessary party to the matter and opposed that party’s intervention in the matter); *Thompson v. Moore*, 2011 WL 3289728 (N.D. Ohio 2011) (imposing sanctions where party filed suit with claims that he knew “were frivolous in that he made no discovery requests and filed an untimely response to Defendant”’ dispositive motion for judgment on the pleadings due to “inadvertent oversight”); *Steele v. City of Cleveland*, 2010 WL 2760396 (N.D. Ohio 2010) (imposing sanctions where “plaintiff “has failed to carry [her] burden by adducing evidence” and “prosecut[ed] a pointless appeal”); *Joe Solo Productions, Inc. v. Dawson*, 2009 WL 3055204 (N.D. Ohio 2009) (imposing sanctions where party filed suit in court without jurisdiction and “consciously rejected several opportunities to correct his erroneous impression”); *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007) (affirming trial court’s imposition of sanctions *sua sponte* where counsel “press[ed] specious legal claims and filings in this case which either contained inappropriate language, claims and assertions (requiring unnecessary responses) or which were inappropriate” and counsel “continued to make personal attacks” despite being warned by the Court that his actions were improper”); *Moore v. International Broth. of Elec. Workers, Local 8*, 2003 WL 22722931 (N.D. Ohio 2003) (imposing sanctions after the court dismissed plaintiff’s frivolous suit and cautioned “plaintiff from continuing to pursue this litigation, either in this court or on appeal,” but plaintiff failed to heed the court’s warning).

(citing *Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1987)) (“[T]he district court did not abuse its discretion in directing the clerk not to accept for filing any additional papers tendered by Walker in this action.”); *Hulen v. Polyak*, 2 F.3d 1151, \*1 (6th Cir. 1993) (affirming district court order “in which the court held that it would not consider any further submissions by Mrs. Polyak to relitigate any issue regarding the parties or the property involved in the partition sale.”); *Polyak v. Boston*, 4 F.3d 994, \*1 (6th Cir. 1993) (“The district court did not abuse its discretion by ordering that no further submissions with respect to this litigation would be considered.”); *see also Hiles v. Mortgage*, 2016 WL 454895, at \*4 (S.D. Oh. Feb. 5, 2016) (enjoining and prohibiting vexatious litigant “from filing any additional motions in this case without leave of Court.”).<sup>2</sup>

Finally, the fact that Andrews is a *pro se* litigant does not excuse him from such sanctions. *See Gitler v. Ohio*, 632 F. Supp. 2d 722, 727 (N.D. Ohio 2009) (“Although §1927 on its face limits who may be sanctioned to ‘an attorney or other person allowed to conduct cases,’

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<sup>2</sup> *See also United States v. Brown*, 2013 WL 6827951, at \*2 (W.D. Tenn. Dec. 20, 2013) (finding that Brown is a vexatious litigant who has restricted filing privileges under 28 U.S.C. § 1915(g); ordering litigant to file no further pleadings until court ruled on pending motions; warning that any violation of the order would be treated as contempt and result in sanctions; and ordering Clerk of Court to not accept any further pleadings for filing in the case until further order of the Court); *In re Atchison-Jorgan*, 2014 WL 1516218 (E.D. Mich. Apr. 17, 2014) (ordering submissions stricken from the docket as filed without legal authority and as frivolous and vexatious); *Smith v. Parks*, 2016 WL 2869776, \*3 (E.D. Ky. May 17, 2016) (“Due to the high volume and repetitive, frivolous nature of his filings, it is necessary to enjoin Smith from filing any additional motions or other pleadings in this case without prior permission from the Court ... An injunction is necessary to achieve an orderly, expeditious disposition of this case. Each time Smith files a motion ... he forces both the Court and the Defendants to needlessly expend resources evaluating and dealing with this filings.”); *Shaw v. Commissioner of Social Sec.*, 2013 WL 5944785, \*2 (E.D. Mich. Nov. 6, 2013) (enjoining Plaintiff “from filing any more papers in this case without first obtaining leave of Court. Any future motions filed without leave will be summarily dismissed.”).

courts in the Sixth Circuit can sanction *pro se* litigants under that provision.”); *see also Moore v. Lafayette Life Insurance Co.*, 458 F. 3d 416, 446-447 (6th Cir. 2006) (finding district court did not abuse its discretion in holding Plaintiff’s attorney and Plaintiff jointly and severally liable for defendant’s attorneys’ fees under §1927); *Tareco Properties, Inc. v. Morris*, 321 F. 3d 545, 550 (6th Cir. 2003) (upholding district court’s order sanctioning both defendant and his attorneys for filing frivolous pleadings in contravention of §1927); *Best v. AT&T, Inc.*, 2014 WL 1923149, \*3 (S.D. Oh. May 14, 2014) (noting the strain on judicial resources caused by frivolous filings and holding that the leeway given to *pro se* plaintiffs “is not without its limits and plaintiff is not entitled to file frivolous motions”; cautioning vexatious litigant that “future filings deemed frivolous will be stricken from the record and may subject him to sanctions, including revocation of electronic filing privileges”).

## **II. Andrews’ Repeated Bad Faith and Vexatious Conduct Warrants The Imposition of Sanctions Now To Prevent Further Damage to the Class.**

This Court has denied three separate meritless motions by Andrews seeking to overturn or stay the appeal bond. On April 13, 2016, this Court imposed a \$145,463 appeal bond on Andrews to protect the class from the costs incurred by Andrews’ frivolous pursuit of his meritless appeal. (Doc. # 2068.) Rather than post the bond, on April 27, 2016, Andrews filed a motion to stay the bond order (Doc. # 2075). Prior to obtaining a ruling on his motion, Andrews then filed, on May 4, 2016 a “Motion for Reconsideration/Stay on Bond Order under Rule 59(e)” (Doc. # 2083) and a “Supplemental Motion to Reconsider Order – Appeal Bond pursuant to FRCP 59(e).” Doc. # 2082. On May 12, 2016, this Court denied all of his motions, stating that they “are yet another misguided attempt to delay this litigation, and confirm this Court’s earlier conclusion that an appeal bond is both appropriate and fully justified.” Doc. # 2089 at 2.



Similarly, the Sixth Circuit has also denied Andrews' pleadings to overturn the bond order and dismissed Andrews' appeal for failing to post bond, *after* Andrews made the same argument to it regarding *Shane* that he made to this Court. On May 14, 2016, the Class moved in the Sixth Circuit to dismiss Andrews' appeal for failure to file the appeal bond. App. No. 16-3168, Doc. 28. A few days later, Andrews filed a cross-motion to stay or reverse the appeal bond. App. No. 16-3168, Doc. 30. Andrews subsequently filed two more pleadings under Fed. R. App. P. 28(j), directing the Sixth Circuit's attention to its decision in *Shane v. Blue Cross Blue Shield*, No. 15-1544, and arguing that *Shane* somehow excused him from having to comply with this Court's Order imposing the appeal bond. App. No. 16-3168, Doc. 34 and 37. On June 20, 2016, the Sixth Circuit affirmed this Court's Order imposing the bond, denied Andrews' motion for relief from the bond, and dismissed Andrews' appeal. App. No. 16-3168, Doc. 38-1. In so doing, the Sixth Circuit stated that "Andrews may move to reinstate his appeal only if he posts the full amount of the appeal bond (\$145,463) no later than fourteen (14) days after this order is entered on the docket." *Id.*

Instead of posting the appeal bond, Andrews then filed, in this Court, a *fifth* motion attacking the appeal bond, entitled "2<sup>nd</sup> Motion for Reconsideration/Stay on Bond Order under Rule 59(e) Based on New Case Law Under *Shane v. Blue Cross* 15-1544" on June 23, 2016 (Doc. # 2102), in which he advanced the same arguments regarding *Shane* that he previously, and unsuccessfully advanced in the Sixth Circuit. When this Court denied this motion, Andrews filed on June 27, 2016—without posting the appeal bond—a petition for *en banc* review, in which he continued to argue the purported merits of his objections and appeal.

Knowing that there are built-in delays in the judicial process, since November 2015, Andrews has without repercussions and reprisals, gamed the judicial system, frustrated, and

impeded the orderly judicial progress of this complex litigation to reach finality. He has persistently flouted this Court's Order to post an appeal bond and repeatedly expressed his intention to continue his course and delay in achieving finality of the Settlements, including threatening to file a petition for a writ certiorari in the U.S. Supreme Court. Andrews has not heeded this Court's warnings, and has demonstrated that he will not stop filing frivolous and vexatious documents unless this Court stops him.

Those who file "unfounded, unmerited, and unsuccessful motions for reconsideration simply because they disagree with a ruling, decision, or order should expect to be sanctioned to the full extent permitted under...28 U.S.C. § 1927." *Miller v. Norfolk Southern Rwy. Co.* 208 F.Supp.2d 851, 854 (N.D. Ohio 2002). As Judge Carr has cautioned:

Nearly two years ago I published a decision in which I undertook to notify counsel that unsuccessful motions for reconsideration would be sanctioned [] *Miller v. Norfolk Southern Rwy. Co.*, 208 F. Supp. 2d 851 (N.D. Ohio, 2002)...The hour I spent in reviewing the motion, my former order, and writing this order is an hour wasted for no useful purpose, and an hour taken from the several other matters awaiting my attention. Counsel was, or certainly should have been on notice of the risk he took in filing the instant motion.

*Great Lakes Towing Co. v. Kornmeier*, 299 F.Supp.2d 793, 794-95 (N.D. Ohio 2014).

In addition, as detailed *supra*, this Court and the Sixth Circuit have repeatedly found Andrews' filings to be frivolous and vexatious. Andrews' half a dozen filings challenging the bond order were not simply meritless, they were based on the *exact same* points and authorities that this Court and the Court of Appeals had already rejected time and time again. Nevertheless, this Court has been reluctant to impose sanctions against him in the past.

The parties and this Court have invested substantial resources to help secure one of the largest all-cash recoveries for a consumer class. Accordingly, the Court has an obligation to protect the Class from damages as a result of pernicious serial objectors. Andrews has already

forced the Class to incur thousands of dollars in lost interest income since April, and the Class will continue to lose thousands in monthly interest from his continued vexatious and frivolous filings, as Defendant, Carpenter Co., is not required to pay its \$43.5 million settlement into escrow while Andrews' claims are pending. As a result, the Court should not only impose monetary sanctions against him for the \$13,086.30 in lost interest from April 2016 through September 2016, but should also exercise its statutory power to enjoin him from making any further filings in this case without first obtaining leave of this Court.

### **CONCLUSION**

Wherefore, Plaintiffs request that this Court enter sanctions against Andrews pursuant to 28 U.S.C. §1927 as follows:

- a. Ordering that he pay to the Class the sum of \$13,086.30 which represents interest already lost to the Class from April 2016 through September 2016, by the delay to achieve final approval of the Carpenter Settlement due to Andrews' frivolous and vexations filings in the District Court and in the Sixth Circuit; and
- b. Enjoining Andrews from filing any papers in the District Court without first obtaining approval of the appropriate court.

Dated: September 27, 2016

Respectfully submitted,

/s/ Marvin A. Miller

Marvin A. Miller

**MILLER LAW LLC**

115 S. LaSalle Street, Suite 2910

Chicago, IL 60603

Phone: 312-332-3400

Fax: 312-676-2676

Email: mmiller@millerlawllc.com

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Plaintiff Class***

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Plaintiff Class***

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Samuel O. Patmore  
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mfehretdinov@stearnsweaver.com

***Counsel for Indirect Purchaser Plaintiff Class***

**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, pursuant to Local Rule 5.1(b)-(c) and Initial Case Management Conference Order dated January 20, 2011 (Dkt. No. 17). Parties may access this filing through the Court's system. Service via U.S. mail was made upon the following counsel and/or *pro se* parties:

Christopher Andrews  
P.O. Box 530394  
Livonia, MI 48153-0394

/s/ Marvin A. Miller  
Marvin A. Miller

# EXHIBIT A

**Marvin A. Miller**

---

**From:** caaloa <caaloa@gmail.com>  
**Sent:** Thursday, September 15, 2016 4:00 PM  
**To:** Marvin A. Miller  
**Subject:** The 6th Circuit and sealing records

Dear Counsel,

What do you make of this as it applies to the sealing issues raised in our case (my missing damage report request) and the bond issue where none is clearly needed. Do you really think the 6th would allow the bond order to stand and have me win at the Supreme Court? Fix the issues.  
Chris Andrews

Since *Shane Group*, document sealing has been on the Sixth Circuit's mind. A few weeks later, the court sua sponte vacated orders to seal motions for summary judgment and accompanying exhibits. *Beauchamp v. Fed. Home Loan Mortg. Corp.*, No. 15-6067, 2016 WL 3671629, at \*4-5 (6th Cir. July 11, 2016). Later, relying once again on *Shane Group*, the Sixth Circuit handed a team of BakerHostetler attorneys a victory on appeal, affirming the unsealing of an entire case. *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, No. 16-5055, 2016 WL 4410575 (6th Cir. July 27, 2016).

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re Polyurethane Foam Antitrust  
Litigation

Case No. 1:10 MD 2196

ORDER OF CIVIL CONTEMPT

This document relates to:  
ALL DIRECT PURCHASER CLASS  
ACTIONS

JUDGE JACK ZOUHARY

Pending before this Court is Indirect Purchaser Plaintiffs' Motion for Finding of Civil Contempt against *pro se* Objector Christopher Andrews (Doc. 2125). The Motion, which follows a series of filings which this Court summarizes next, is granted.

On October 24, this Court found that Andrews had engaged in a pattern and practice of the "vexatious use of the judicial system" and further found that Andrews had for some time "ignored both this Court's Orders and rulings from the Sixth Circuit" (Doc. 2113 at 2). As a result, this Court imposed a monetary sanction of \$15,303. Andrews moved twice to reconsider and those requests were denied (Doc. 2115–17, 2123)

On November 29, class counsel served Andrews with a Notice of Deposition and Request for Production of Documents to assist in their efforts to collect on the monetary sanction. Andrews was noticed to produce financial records by December 19 and appear for a deposition on December 20. Andrews then moved this Court to cancel or stay the deposition (Doc. 2119) which class counsel opposed (Docs. 2120–2122). This Court granted Andrews a one-day extension, ordering him to appear for his deposition on December 21 (Doc. 2124), with the warning that failure to appear could result in an additional sanction.

On December 14, Andrews repeated that he would not attend the December 21 deposition. His reasons were frivolous, primarily indicating he had no time to do anything but prepare papers for a Writ of Certiorari to the United States Supreme Court on an appeal of earlier Orders from both this Court and the Sixth Circuit. This Court denied Andrews' request for any further postponements. *See*



letters from Andrews, attached as Exhibits A and B, which were not filed pursuant to this Court's Order (Doc. 2123).

Perhaps not surprisingly, Andrews failed to produce any documents and failed to appear for his deposition as ordered. A phone call from class counsel to inquire as to his whereabouts went unanswered (Doc. 2126). His disappearing act remains unexplained.

In a similar situation, in the case of *In Re TFT-LCD*, 289 F.R.D. 548, 553–54 (N.D. Cal. 2013), objectors to an antitrust class action settlement were ordered to appear for depositions, but failed to do so. The court there found that the objectors and their counsel violated a court order requiring the appearance of the objectors for deposition. The court further found the objectors failed to show efforts to comply with the court order, or provide sufficient justification for failing to comply, and therefore held the objectors in civil contempt, awarding monetary sanctions to compensate class counsel for fees incurred pursuing the depositions.

That same holding applies equally here. Objector Andrews has already provided this Court with an “in your face” statement (Exhibits A and B) that under no circumstances would he attend the deposition, against a background of this Court's patient handling of his ongoing misconduct. Andrews proclaimed he would make no effort to comply with this Court's Order, and this Court finds, by clear and convincing evidence, that Andrews be held in civil contempt. The United States Marshals are directed to bring Andrews before this Court as soon as practicable for him to answer why he should not be required to pay an additional monetary sanction in light of his continued contumacious conduct, and his undisguised failure to follow this Court's December Orders.

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE

December 29, 2016

Clerk of the Court

U.S. District Court

Northern District of Ohio

United States Courthouse

1716 Spielbusch Avenue

Toledo, OH 43604

Polyurethane Foam Antitrust Litigation,

Case No. 10-MD-2196

Judge Jack Zouhary

Christopher Andrews, Pro se Objector

Response to Docket 2122

The request to send a check to American Deposit Management Co., Escrowee is legally invalid. Because Class Counsel failed to do their job properly, the Court failed to appoint and/or reappoint Class Counsel, the Claims Administrator and the Escrow agent making the entire approval legally invalid and reversible, the Supreme Court will accept the Writ and reverse the appeal bond order.

The defendants have no and had no legal obligation to send funds to an entity that legally does not have to follow any court orders and decrees because the court has no oversight and authority over them. There is no lost interest since the funds should not be in that institution to begin with. Counsel is at fault for not forcing defendant to pay up front, Class Counsel should absorb this interest allegedly lost. Any sanctions, collection of interest, a creditor's hearing and the demand to send a check to a nonparty in this litigation is void. What a legal quagmire Class Counsel has gotten the parties into. The creditor's hearing is a bit premature and unlawful.

I certify under penalty of perjury that all of the above is true and accurate to the best of my knowledge.

  
Chris Andrews, Pro se, December 08, 2016 PO Box 530394,

Livonia, MI 48153-0394, Telephone 248-635-3810 Email: caalooa@gmail.com

**Proof of Service**

I hereby certify that on December 08, 2016 I sent by USPS Priority Mail this document to the Clerk of the United States Court and sent a copy to Mr. Miller via first class mail.



Chris Andrews  
PO Box 530394  
Livonia, MI 48153-0394  
Telephone 248-635-3810  
Email: caaloe@gmail.com  
Pro se Appellant

Clerk of the Court

U.S. District Court

Northern District of Ohio

United States Courthouse

1716 Spielbusch Avenue

Toledo, OH 43604

Polyurethane Foam Antitrust Litigation,

Case No. 10-MD-2196

Judge Jack Zouhary

Christopher Andrews, Pro se Objector

Response to Orders 2123 and 2124

Dear Mr. Miller,

I am in receipt of the Court's latest orders. If I don't have time to attend a Preliminary Approval hearing in Detroit tomorrow, December 13, 2016, I surely don't have the time to drive 65 miles or approximately 80 minutes one way into Ohio to attend a hearing (another five-six hours shot) that is designed and absolutely does hinder my ability to finish this writ accurately and on time. I also could not attend a final approval hearing in CA on Friday December 16 2016, out of time and money.

The Court and class counsel are hindering my ability to accurately finish this Writ accurately and on time, both parties have a vested interest in causing me delay, and hope I make a mistake but the parties have everything to lose when this writ is accepted, hence this rush to depose. This objector is also unaware he can appeal the court's orders, and now that I know I don't have the time to file anything.

The court mentioned something about my time to file the writ. As a result I have just reviewed the Supreme Court guidelines and the amount of time I have left to file is not December 20, 2016 but December 27, 2016, based on the postmark date, not on the arrival date, and I will need every extra hour of it. You have now cost me 11 hours of time in the last three weeks, you will not waste any more of it, I will not be hurried.

I will be filing the writ In forma pauperis so if you wait two more weeks you will find the hearing you have scheduled and the court agreed to is waste of time.

Unfortunately I will not be able to attend on Wed December 21, 2016 for all the reasons listed above and in my previous filings so please reschedule. I will not open any emails, snail mail or listen to voicemails regarding this case until the writ is in the mail. I will then send an email soon after that occurs to arrange a time to sit for your deposition. Wait until the parties see this jaw dropping writ which will get the bond reversed and eventually the approval reversed and your fee forfeited. Does the court know about the huge fraud fib in your fee petition that causes the fee award to violate and conflict with this circuit's, other circuit's and Supreme Court precedent?

You mentioned in a previous email that I had a "schedule" I had received regarding the sanctions. False, I have nothing in my possession. The Court's order is vague and ambiguous as to how this alleged damage amount is calculated and what it is based on. I will not accept responsibility for other's errors.

Chris Andrews

## **Blue Cross hearing next week**

caalooa <caalooa@gmail.com> Dec 8 (4 days ago)

to Dan

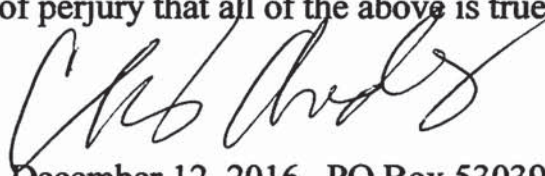


Dear Dan,

The writ to the Supreme Court in foam case is taking longer than expected so every hour counts. In addition to that is the the fact that counsel in foam has wasted ten hours hours of my valuable time dealing with and responding to the deposition and documents hearing and filings being made on both sides which, as intended, has hindered the completion of the writ being completed in appropriate time tranches. I will therefore be unable to attend the hearing Tuesday, most unfortunate.

Chris Andrews

I certify under penalty of perjury that all of the above is true and accurate to the best of my knowledge.

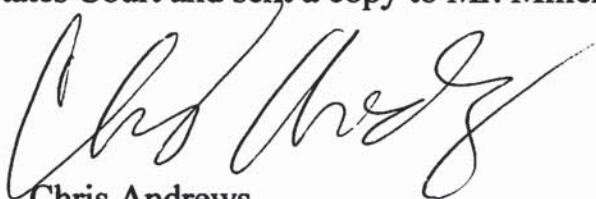


Chris Andrews, Pro se, December 12, 2016 PO Box 530394,

Livonia, MI 48153-0394, Telephone 248-635-3810 Email: caalooa@gmail.com

**Proof of Service**

I hereby certify that on December 12, 2016 I sent by USPS Priority Mail this document to the Clerk of the United States Court and sent a copy to Mr. Miller via first class mail.



Chris Andrews  
PO Box 530394  
Livonia, MI 48153-0394  
Telephone 248-635-3810  
Email: caalooa@gmail.com  
Pro se Appellant



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re Polyurethane Foam Antitrust  
Litigation

Case No. 1:10 MD 2196

O R D E R

This document relates to:

ALL INDIRECT PURCHASER CLASS  
ACTIONS

JUDGE JACK ZOUHARY

Pending before this Court is *pro se* Objector Christopher Andrews' Motion for Permission to Appeal *in forma pauperis* (Doc. 2156). Andrews' finances have been the subject of much debate during this litigation (*see, e.g.*, Docs. 2119, 2120, 2121, 2122, 2125, 2126, 2127, 2133, 2140, 2141). Under the circumstances, this Court requires additional documentation of Andrews' financial status to effectively evaluate his Motion. Accordingly, class counsel shall promptly file under seal the documents referenced in the January 9 and January 13 Orders (Docs. 2133, 2141), which were produced by Andrews during the limited discovery related to the October 24 Order (Doc. 2113).

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE

March 22, 2017